(25,822)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 992.

H. J. GUNNING AND ELLEN E. GUNNING, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

PETER MORRISON AND AGNES MORRISON, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

	Original.	Print
Transcript of record from the Superior Court of Spokane County	1	1
Complaint	1	1
Answer	4	3
Motion to strike out answer, &c.	12	8
Order on motion to strike out answer, &c.	14	9
Supplemental complaint	15	10
Answer to supplemental complaint	18	12
Testimony of Peter Morrison.	19	13
Testimony of Henry J. Gunning	20	14
Findings of fact and conclusions of law proposed by defendants	25	16
Findings of fact and conclusions of law	29	19
Judgment	35	22

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	Original.	Print
Opinion *per curiam*	37	24
Clerk's certificate	38	24
Judgment	39	24
Petition for writ of error and assignment of errors	41	25
Order allowing writ of error	44	27
Bond on writ of error	45	27
Writ of error	47	28
Certificate of lodgment	49	29
Citation and service	50	30
Clerk's return to writ of error	51	30
Clerk's certificate	52	31

1 In the Superior Court of the State of Washington in and for the County of Spokane.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

H. J. GUNNING and JANE DOE GUNNING, Whose True Name is Unknown, His Wife, Defendants.

Complaint.

Come now the plaintiffs in the above entitled action, and for cause of action against the defendants allege:

I.

That at and during all of the times herein mentioned, the defendants, H. J. Gunning and Jane Doe Gunning, whose true name is unknown, have been, and now are, husband and wife.

II.

That the plaintiffs were at all times herein mentioned in the peaceable and undisturbed possession of the following described property situate in the County of Spokane, State of Washington, and had been in such peaceable and undisturbed possession of said property for more than five days next preceding the entry by the defendants, hereinafter set forth, to-wit, for over twelve years, said property being the following:

Beginning at a point where the line between Lots 3 and 4, Sec. 33, T. 25, N. of R. 45, E. W. M. projected West intersects the westerly meander line of Saltese Lake, thence northerly to the point where said meander line intersects the west line of said Sec. 33 projected north, thence North on said West line of Sec. 33 so projected to the point where it intersects the north line of said Sec. 33 projected West, thence East on said North line so projected to its intersection with the North and South center line of Sec. 33 projected North, thence South along said center line so projected to the point where same intersects the Easterly meander line of Saltese Lake, thence southerly along said meander line to the point where the said center line so projected again intersects said meander line, thence south on said projected center line to the point of intersection with the line between Lots 1 and 3 of Sec. 33 projected west, thence west on said line between Lots 1 and 3, Sec. 33 so projected about 80 rods, and thence south to the intersection with the line between Lots 3 and 4, Sec. 33 projected west, thence west on said line between Lots 3 and 4,
2 Sec. 33, so projected to the point of beginning, being in the bed of Saltese Lake, County of Spokane, State of Washington.

III.

That during all of the times herein referred to a good and substantial fence was maintained by the plaintiffs around said premises, enclosing the same.

IV.

That on or about the 10th day of March, 1914, at a time when plaintiffs were absent from said premises, and during such absence, to-wit, about — o'clock in the night time, the defendants broke the said enclosure so maintained by the plaintiffs about said premises, and entered upon said premises, and thence continuously occupy and remain upon said premises.

V.

That on the 3rd day of April, 1914, plaintiffs, in writing, notified defendants to remove from said premises, and demanded that defendants surrender the same to plaintiffs, and that defendants have for the period of more than three days, to-wit, from the date of said demand, refused to remove therefrom or to surrender the same.

VI.

That the possession of said lands is of great value to plaintiffs, and that being kept out of possession of said premises, will occasion a loss and damage to plaintiffs in the sum of $1400.00.

Wherefore, plaintiffs pray for judgment: (1) for the restitution of said premises; (2) for an order from this Court for a writ of restitution restoring to the plaintiffs the property hereinabove described; (3) for double damages in the sum of $2800.00; (4) for plaintiffs' costs and disbursements in this behalf expended.

VOORHEES & CANFIELD,
Attorneys for Plaintiffs.
MERRITT, OSWOLD & MERRITT,
Attorneys for Plaintiffs.

3 STATE OF WASHINGTON,
County of Spokane, ss:

Peter Morrison, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in the above entitled action, that he has read the foregoing complaint, knows the contents thereof, and that the same is true, as he verily believes.

PETER MORRISON.

Subscribed and sworn to before me this 9 day of April, 1914.

REESE H. VOORHEES,
Notary Public in and for the State of Washington, Residing at Spokane, Wash.

Filed Apr. 10, 1914, at 9:15 A. M. Glenn B. Derbyshire, Clerk; W. C. Steinmetz, Deputy.

4 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

HENRY J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Answer.

Now come the above defendants and for answer to the complaint of the plaintiffs herein den*ies* and alleg*es* as follows:

I.

Defendants deny paragraphs 2 and 3 of plaintiffs' complaint, and all thereof.

II.

Answering paragraph 4 of plaintiffs' complaint, these defendants admit that they are occupying and in the possession of the premises as described in paragraph 2 of plaintiffs' complaint, and further admit that on or about the 3rd day of April, 1914, plaintiffs notified defendants in writing to remove from said premises, and also admit that defendants have failed and refused to remove therefrom, or to surrender same to plaintiffs, and deny each and every other allegation, matter and thing set forth and contained therein.

III.

Answering paragraph 5 of plaintiffs' complaint, these defendants deny each and every allegation, matter and thing therein contained.

For a further and affirmative defense to the complaint of the plaintiffs, defendants allege:

5 I.

That in the year 1877, the Government of the United States caused to be surveyed Townships 24 and 25 North, of Range 45, E. W. M. with the exceptions as hereinafter set forth, the same being surveyed during the year above mentioned by a surveyor employed for that purpose by the Government of the United States, under a contract entered into between the United States and said surveyor. That in violation of said contract and of his duty in making the survey of said townships, the said surveyor either inadvertently or fraudulently failed and neglected to survey a portion of Sections 4

and 5 in Twp. 24, and a portion of Sections 20, 28, 29, 32 and 33 in said Township 25, North of Range 45, E. W. M. containing approximately 1200 acres in a contiguous body, or any part thereof, and no part thereof has since been surveyed by the Government of the United States, and all of said lands not surveyed, as aforesaid, ever since have been, and now are, unsurveyed, unappropriated government lands of the United States, belonging to the Government of the United States as a part of its public domain, subject to, and open for, settlement under the Homestead Laws of the United States, and the lands and premises set forth and described in plaintiffs' complaint form and are a part of said tract of land in said township not surveyed, as aforesaid. That said lands not surveyed, as aforesaid, are, and for many years last past have been, good agricultural lands susceptible of cultivation and susceptible of being farmed and cultivated to hay, grain and other agricultural crops, and were at the time of the survey of other lands in said township, as aforesaid, of such a character as should have been, under the laws governing the survey of public lands, surveyed as a part of the public domain of the United States.

6 II.

That on the 30th day of October, 1909, defendants, in good faith as homestead settlers, and for the purpose of defendant Henry J. Gunning, thereafter making a homestead entry thereon and acquiring title thereto from the Government of the United States under the Homestead Laws, made settlement upon the lands described in plaintiffs' complaint, and all thereof, and have never since abandoned such settlement, and are still occupying said land, and all thereof, as homestead settlers thereon in good faith under the homestead laws of the United States, and not otherwise.

That at the time defendants made settlement upon said land, *and* aforesaid, there was no one residing thereon, or any portion thereof, and no other person had prior thereto settled upon said land, or any part or portion thereof, claiming same as a homestead settler under the homestead laws of the United States, or under any laws of the United States, and there was not, at the time defendants settled upon said land as aforesaid, any improvements thereon, or upon any port or portion thereof, made by any person claiming said land as a settler under the homestead laws of the United States, or under any law of the United States, and defendants were, at the time of such settlement and ever since have been, and still are, the only persons occupying such lands, or any portion thereof, under the homestead laws of the United States, or under any law of the United States.

That at the time of making such settlement, defendant Henry J. Gunning, was over the a*h*e of Twenty-One years, the head of a family, a native born citizen of the United States, and was not the proprietor of over 160 acres of land in any state or territory of the United States, and had never prior thereto made any entry upon public lands under the Homestead Laws of the United States,

7 and them was, and now is, in every way qualified to make settlement upon, and entry of, public lands and acquire title thereto from the Government of the United States, under the Homestead Laws of the United States.

That in making said settlement upon said land, as aforesaid, defendants on the 30th day of October, 1909, erected upon said tract of land, a frame, lumber house with door, window and floor, suitable for habitation at any and all, seasons of the year. That they then and there upon said date furnished said house with all necessary cooking and household utensils, and entered into the possession and occupation of said house and established their residence therein, and are now residing upon said land, under said settlement, and have never since said 30th day of October, 1909, voluntarily abandoned their said settlement and residence upon said land. That in making settlement upon, and in residing upon, said land, as aforesaid, defendants did so in good faith with the bona fide intention to continue to reside upon and occupy said land, and cultivate the same, as required under the homestead laws of the United States, and defendants settled upon and established their residence upon said land with the full intention to occupy, improve and reside thereon and comply with all requirements of the homestead laws of the United States, and for no other purpose. That in order to comply with the requirement of the homestead laws of the United States and acquire title to said land, so settled upon by defendants, as aforesaid, under said laws it becomes, and is, necessary for defendants to reside upon and cultivate said land, and have possession thereof, for a period of five years, and unless defendants can so reside upon, cultivate and have possession of said land for and during the period of said time, said defendants cannot comply with the requirements of the homestead laws of the United States, and sustain and maintain their rights to said land, and acquire title thereto, from the government of the United States under the homestead laws of the United States.

8 III.

That plaintiff, Peter Morrison, without any right so to do, has for several seasons last past wrongfully and unlawfully cropped and harvested hay upon said land, and ever since defendants made settlement and established their residence upon said land, on the 30th day of October, 1909, as aforesaid, said plaintiff, Peter Morrison, and other-, at his instigation, and acting for and on his behalf have for the purpose of preventing defendants from continuing their settlement and residence thereon as required by the homestead laws of the United States, and to prevent defendants from acquiring title to said land, under the homestead laws of the United States, and for the purpose of harrassing and annoying defendants, and in order that said plaintiff may continue to wrongfully and unlawfully crop, and cultivate said land, and to cut and harvest the hay growing thereon *from* his own profit, and for the purpose of harrassing and annoying defendants, have wrongfully and unlawfully hindered and delayed defendants in their settlement and residence on said

land, and at one time, to-wit: during the month of November, 1909, wrongfully and unlawfully caused the arrest of defendant Henry J. Gunning for unlawful trespass upon said land, and during the temporary absence of defendant from said land, caused by reason of such arrest, by force and against the will of defendants, removed defendants' house from said land and removed from said land all of defendants' household and personal property and did threaten said defendant Henry J. Gunning with further arrest and imprisonment, and said plaintiff, Peter Morrison, and others, acting for and in his behalf and at his instigation, have wrongfully sought to have said defendant, Henry J. Gunning, arrested and made complaint to the prosecuting attorney in and for Spokane County, Washington, and endeavored to have said prosecuting attorney approve
9 the issuance of a warrant for the arrest of said defendant, upon the false charges that said defendant was unlawfully trespassing upon the lands and premises of said plaintiff, and by the removal of defendants' house and household and personal effects from said land, defendants have been required to and have constructed another house thereon and said plaintiff, Peter Morrison, has wrongfully and unlawfully delayed these defendants in maintaining and continuing their settlement and residence upon said land by reason of the unlawful and wrongful acts of said plaintiff, and others, defendants have been greatly hindered and prevented from at all times continuing their settlement and residence upon said land since first making settlement and estabishing their residence thereon, and this action has been brought, and is being prosecuted by plaintiffs for the purpose of further harrassing, annoying, hindering and preventing these defendants from continuing their settlement and residence upon said land, as homestead settlers thereon under the homestead laws of the United States, and prevent the defendants from acquiring title thereto under the homestead laws of the United States, and for no other purpose, in order that plaintiffs may continue to wrongfully and unlawfully crop and sultivate the same and derive a profit therefrom.

IV.

That by virtue of the settlement and residence upon said land by defendants, as aforesaid, defendants are entitled to use, occupy and control the same, and to the possession thereof, and entitled to reside thereon, and make same their home and place of residence under the homestead laws of the United States, and said plaintiff, Peter Morrison, by reason of his acts, as hereinbefore set forth, is wrongfully and unlawfully interfering with the defendants and preventing them from exercising their rights under the homestead laws of the United States. That plaintiff, or either of them, have
10 never made settlement upon said land, or upon any part or portion thereof, or resided thereon, and have never attempted to use, occupy or improve the same, or to claim any right thereto, under the homestead settlement laws of the United States or under any law of the United States, and said plaintiffs, or either of them,

are not, and have not been during the time herein mentioned, qualified to settle upon said land under the homestead laws of the United States, and acquire title to said land under the homestead laws of the United States, or under any law of the United States, and said plaintiffs have not, and never have had, any right, title or interest in and to said land, or any right to the possession thereof, or any part thereof, under any claim or right acquired from the Government of the United States, or under any law of the United States, and all of the acts of plaintiffs in cultivating said land and cropping the same, as hereinbefore set forth constitutes, and is, a trespass upon the public lands of the United States, and is, and was, unlawful and by and through which plaintiffs never acquired, and cannot acquire, any right or interest in and to said land or to the rightful or lawful possession thereof, or to any part thereof.

V.

That on or about the 10th day of April, 1914, while these defendants were occupying said land and residing thereon as hereinbefore set forth, the plaintiff, Peter Morrison, wrongfully and unlawfully entered thereon and commenced to cultivate said land, and to seed the same to crop with the wrongful and unlawful purpose of growing and harvesting a crop of grain and hay thereon during the season of 1914, and notwithstanding the objections and protests of defendants, said plaintiff has seeded a portion of said land to crop, and has continued to harrass, annoy and delay defendants in their settlement and occupation of said land.

11

VI.

That hereto attached, and made a part hereof, is a true and correct plat of Township 25 North, Range 45 E. W. M. certified to as such by Hal J. Cole, Register of the United States Land Office of Spokane, Washington, showing the lands in sections 20, 28, 29, 32 and 33 in said Township, not surveyed at the time of the Government Survey of said Township, the lands described in plaintiff's complaint being a part thereof and not surveyed, as shown by said plat.

VII.

That the use and occupation of said land by defendants is of great value to defendants, and the acts of plaintiffs, as set forth has, and is causing defendants great loss and injury, to-wit: in the sum of Three Thousand Five Hundred Dollars ($3,500).

Wherefore, defendants pray judgment:

1st. That plaintiffs take nothing by this action, and that same be dismissed with costs to these defendants.

2nd. That it be declared by the judgment and decree of this court that defendants are entitled to the possession of said land and

premises, and all thereof, and that plaintiffs are not entitled to the possession thereof, or any part thereof.

3rd. That defendants have and recover damages against plaintiffs in the sum of $3,500.00.

SKUSE & MORRILL,
Attorneys for Defendants,
Suite 745 Peyton Bldg.

STATE OF WASHINGTON,
County of Spokane, ss:

H. J. Gunning, being first duly sworn, on oath says: That he is one of the defendants in the above entitled action and makes this verification for and on behalf of the defendants; that he has read the foregoing Answer, knows the contents thereof, and the same is true as he verily believes.

H. J. GUNNING.

Subscribed and sworn to before me this 2nd day of May, 1914.

FRED B. MORRILL,
Notary Public in and for the State of Washington, Residing at Spokane.

12 In the Superior Court of the State of Washington in and for the County of Spokane.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

HENRY J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Motion to Strike.

1. Come now the plaintiffs above named, and move the court for an order striking from the answer of the above named defendants in said action the whole of the matter therein entitled "further and affirmative defense to the complaint of the plaintiffs," and each and every part thereof on the ground that the same is irrelevant, redundant and immaterial.

2. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph I of the "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

3. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph II of the "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

4. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph III of the "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

5. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph IV of the
13 "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

6. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph V of the "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

7. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph VI of the "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

8. Plaintiffs move the court for an order striking from the answer of the defendants to said action paragraph VII of the "further and affirmative defense to the complaint of the plaintiffs therein" on the ground that the same is irrelevant, redundant and immaterial.

VOORHEES & CANFIELD,
Attorneys for Plaintiffs.

Filed May 5, 1914. Glenn B. Derbyshire, Clerk, E. E. Benton, Deputy.

14 In the Superior Court of the State of Washington in and for the County of Spokane.

44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

HENRY J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Order Granting Motion to Strike.

The above entitled cause coming on to be heard on the 1st day of September, 1914, on the motion of the above named plaintiffs to strike from the answer of the above named defendants the affirmative defense therein, the plaintiffs being represented by their counsel, Voorhees & Canfield, and the defendants by their counsel, Skuse & Morrill, and the said counsel having been heard, and the court being fully advised in the premises, it is

Ordered that the said motion to strike be, and hereby is, granted, and that the further and affirmative defense in defendants' answer, consisting of paragraphs I, II, III, IV, V, VI and VII, and the whole thereof, be and hereby is, stricken from said answer.

Defendants except and exception is allowed.

Done in open court this 6th day of October, 1914.

J. STANLEY WEBSTER, *Judge.*

O. K.
S. & M.

Filed Oct. 6, 1914 at 10:30 o'clock, A. M. Glenn B. Derbyshire, Clerk, N. Paulsen, Deputy.

In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

H. J. GUNNING and JANE DOE GUNNING, Hif Wife, Defendants.

Supplemental Complaint.

Come now the plaintiffs in the above entitled action, and by leave of court file this, their supplemental complaint, in said action and allege:

I.

That on April 10th, 1914, plaintiffs filed the original summons and complaint herein, and on the 10th day of April, 1914, duly made application to the above entitled court for a writ of restitution to the plaintiffs of the premises described in said original complaint, and that on said April 10th, 1914, order issued from said court directing the clerk of said court to issue under the seal of said court the writ of restitution directed to the sheriff of Spokane County, commanding him to restore to the plaintiffs the premises in said complaint described, and to oust the defendants therefrom, and directing plaintiffs to file a bond pursuant to the statute in that regard in the sum of $2500.00; that pursuant to said order said writ was issued to said sheriff and said bond was duly filed by said plaintiffs on the said 10th day of April, 1914, and said writ was forthwith served upon said defendants by said sheriff; that within three days thereof, to-wit, on or about April 13th, 1914, defendants filed a bond for the retention of the possession of said premises, the amount of which was fixed by this court pursuant to Section 820 of Remington & Ballinger's Code, and elected to retain, and
16 did retain, and do still retain, possession of said premises.

II.

That at the time of the entry and taking possession of said premises by the defendants, plaintiffs were farming said premises and were preparing to sow the crop thereon, and had cultivated said land therefor, and were putting in and would have raised said crop of hay, grain and other produce for the season of 1914 last past, and owned and kept on said premises many horses and much machinery therefor, and the value of said crop and the return to plaintiffs therefrom would have been the sum of $2324.40; that the plaintiffs

expended the sum of $84.00 in the cultivation and preparation for said crop up to the time they were prevented from further cultivation and preparation by the said entry and possession by the said defendants; that the profit to plaintiffs on said crop if they had been permitted to raise and harvest the same would have been $1437.60; that by reason of the said entry and continuing possession of said premises by defendants since the filing of said original complaint, as aforesaid, plaintiffs have been prevented from raising and harvesting said crop and have entirely lost the same and have thereby been damaged in the sum of $1521.60; that at the time of said entry and the taking of possession, as aforesaid, and at the time of the filing of said bond, as aforesaid, by said defendants, plaintiffs were the owners of a large number of milk cows and were carrying on the dairy business and were making therefrom the sum of $80.00 per month, and were pasturing many of said cows upon the lands described in the complaint herein, which pasturing was necessary to maintaining and carrying on of said dairy business; that by reason of the said entry and continuing possession of said premises by defendants since the filing of said original complaint, as aforesaid, plaintiffs have been prevented from pasturing the said cows upon said lands, and have been prevented from carrying on
17 said dairy business with said cows, and have been forced to sell the same, and the said dairy business with the said cows and the sale of the milk and the profit therefrom has been entirely lost and destroyed to plaintiffs to their damage in the sum of $50.00. That the value of the occupation of the said premises since said entry and possession, as aforesaid, is the sum of $1571.60.

Wherefore, plaintiffs pray for judgment: (1) for the restitution of said premises; (2) for an order from this court for a writ of restitution restoring to the plaintiffs the property hereinabove referred to and in said original complaint described; (3) for double damages in the sum of $3,143.20; (4) for plaintiffs' costs and disbursements in this behalf expended.

VOORHEES & CANFIELD,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Spokane, ss:

Peter Morrison, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the above and foregoing Supplemental Complaint, knows the contents thereof, and the same is true as affiant verily believes.

PETER MORRISON.

Subscribed and sworn to before me this 2nd day of November, 1914.

REESE H. VOORHEES,
Notary Public in and for the State of Washington, Residing at Spokane, Wash.

Due service of the within by a true copy thereof is hereby accepted at Spokane, Washington, this 3rd day of Nov. 1914.

SKUSE & MORRILL,
Attorney- for Dep't.

Filed Nov. 5, 1914 at 10 o'clock A. M. Glenn B. Derbyshire, Clerk, N. Paulsen, Deputy.

18 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON et ux., Plaintiffs,

vs.

H. J. GUNNING et ux., Defendants.

Answer to Supplemental Complaint.

Now appear the above named defendants and for answer to the Supplemental Complaint of the plaintiffs deny and allege as follows:

I.

Admit paragraph I of said supplemental complaint.

II.

Answering paragraph 2 of said supplemental complaint, defendants deny each and every allegation, matter and thing therein contained, and all thereof, and especially deny that plaintiffs have been injured or damaged by reason of the occupation of the premises in question by defendants in the sum of $1,571.60, or in any sum or sums whatever.

Wherefore, defendants pray that plaintiffs' action be dismissed and for their costs and disbursements herein.

SKUSE & MORRILL,
Attorneys for Defendants.

STATE OF WASHINGTON,
County of Spokane, ss:

H. J. Gunning, being first duly sworn, on oath says: That he is one of the defendants in the above entitled action; that he has read the foregoing Answer to the Supplemental Complaint, knows the contents thereof, and the same is true as he verily believes.

H. J. GUNNING.

Subscribed and sworn to before me this 16th day of November, 1914.

FRED B. MORRILL,
Notary Public in and for the State of Washington, Residing at Spokane.

Service of the within answer & Supplemental Complaint is hereby acknowledged, this 11th day of December, 1914.

VOORHEES & CANFILED,
Attorneys for Plaintiffs.

Filed Dec. 18, 1914, at 10 o'clock A. M. Glenn B. Derbyshire, Clerk, E. F. Burton, Deputy.

19 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON and AGNES MORRISON, Plaintiffs,

vs.

H. J. GUNNING and ELLEN E. GUNNING, Defendants.

Be it remembered that the above entitled cause, having been consolidated under agreement of parties and by order of the court, with cases Nos. 44596, 44594, 44580, 44579, 44578 and 44581, came regularly on for hearing in the above entitled court on the 6th day of January, 1915, before the Honorable William A. Huneke, Judge presiding, without a jury, plaintiffs appearing in person and by their attorneys, Messrs. Voorhees & Canfield, and defendants appearing in person and by their attorneys, Messrs. Skuse & Morrill, whereupon the following proceedings were had:

PETER MORRISON, one of the plaintiffs, called in his own behalf was duly sworn and testified as follows in case No. 44595 against H. J. Gunning and Ellen E. Gunning:

Q. State your name and occupation.
A. Peter Morrison; occupation, farmer.

By Mr. Morrill: In order to save time and expense, it is hereby admitted on the part of the defendants that for more than five years prior to the 10th day of March, 1914, and continued for five days next prior to the entry of defendants, plaintiffs were in the peaceable and undisturbed possession of the land in question and as described in the complaint of the plaintiffs. That prior to and on the 10th day of March, 1914, and at the time of the entry by de-
20 fendants, said lands and premises were enclosed with a fence constructed and maintained thereon by plaintiffs. That in the night time and about 2:00 o'clock A. M. on March 10th, 1914, and during the absence of plaintiffs from said premises, defendants

entered upon said premises without the consent of plaintiffs and have ever since remained thereon.

Thereupon plaintiffs submitted evidence supporting all of the allegations of their complaint, and supplemental complaint.

Plaintiffs rest.

HENRY J. GUNNING, called and sworn in his own behalf, testified as follows:

Q. State your name, residence and occupation.

A. Henry J. Gunning, reside upon the land in question; occupation, farmer.

Q. You may state, Mr. Gunning, for what purpose you entered upon the land in question on the 10th day of March, 1914.

Mr. Voorhees: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Morrill: This defendant at this time offers to prove and show to the court by his own testimony that on the 30th day of October, 1909, he was over the age of twenty-one years, the head of a family, a native born citizen of the United States and not the proprietor of more than one hundred sixty acres of land in any state or territory of the United States, and had never prior to said date made any entry upon public land under the homestead laws of the United States, or settled thereon as a homestead settler under homestead laws of the United States, and then and there, was and now is, in every way qualified to make settlement upon and entry of public lands of the United States, and acquire title thereto under the homestead laws of the United States. That on the 30th day of October, 1909, this defendant in good faith as a homestead settler, and for the purpose
21 of making homestead entry and acquiring title to the lands in question from the government of the United States under the homestead law of the United States, made settlement upon the lands in question and all thereof, and has never since voluntarily abandoned his settlement thereon and is still occupying said lands, and all thereof, as a homestead settler in good faith under the homestead laws of the United States. That at the time said defendant settled upon said lands there was no one residing thereon or upon any part or portion thereof, and no person had prior thereto settled upon said lands or upon any part or portion thereof claiming same under the Homestead Laws of the United States, or under any law of the United States, and there was not at the time this defendant made settlement upon said lands any improvements thereon or upon any part or portion thereof made by any person claiming said lands as a settler under the homestead laws of the United States, or under any law of the United States, and that this defendant was at the time of making such settlement, and ever since has been, and still is, the only person occupying the lands in question, or any part thereof, under the homestead laws of the United States, or under any law of the United States. That in making his said settlement upon said land, defendant, on the 30th day of October, 1909, erected thereon a frame, lumber house

with doors, windows and floors, suitable for habitation at any and all seasons of the year; that he then and there upon said date furnished said house with the necessary cooking and household utensils and entered into the possession and occupation of said house and established his residence therein and is now residing upon said tract and has never since said 30th day of October, 1909, voluntarily abandoned the same. That in making settlement upon and in residing upon said land, defendant did so in good faith with the bona fide intention of continuing to reside upon and occupy said lands and cultivate and improve the same as required by the homestead laws of the United States and comply with all the requirements of the
22 homestead laws of the United States, with the full intention and purpose of occupying and residing thereon and complying with all the requirements of the homestead laws of the United States, and for no other purpose. That said lands are and were at the time the defendant made his settlement and established his residence thereon, good agricultural lands, susceptible of being farmed and cultivated as other agricultural lands, and only valuable for agricultural purposes, and that the only use said lands can be put to is for farming purposes, for the raising of agricultural crops thereon. That after establishing his residence upon said lands, defendant resided thereon until the 9th day of November, 1909, at which time he was arrested at the instigation of the plaintiff and removed from the said land, and his house and improvements were also removed therefrom, and the defendant was not able to return to said land, and again take up his residence thereon until the 10th day of March, 1914, at which time he returned to said land and constructed a good habitable house thereon and has resided thereon and upon said land ever since as a bona fide settler under the homestead laws of the United States, for the purpose of acquiring title to said lands under such laws, and for no other purpose.

Mr. Voorhees: We object, if your honor please, to the offer on the ground that it is in conflict with the admission of peaceable possession, undisturbed, made by the defendant; on the ground that it is in support of the affirmative defense set out in the answer, all of which has been struck out heretofore on motion and order of this court in this action. That the matter offered to be proven is under the ruling of our Supreme Court and under the statute of this state, immaterial, irrelevant and incompetent, in that title or right of possession cannot be proven in forcible entry and detainer actions; that the good faith or the bad faith of the parties intruding on
23 land, or the claim of right, is utterly immaterial, irrelevant and incompetent; and that in returning to the land as admitted in this offer, after being once removed therefrom, under arrest by an officer, the defendant admits himself guilty of violating the statutes of the State of Washington, and cannot be heard in a court of justice to prove his own turpitude and criminal act as a support of a right.

Mr. Morrill: The defendant at this time also offers to prove and to show to the court by the testimony of H. T. Cole, the register of the United States Land Office at Spokane, Washington, and by the

official records of said Land Office, that the lands and premises in question were a part of a contiguous body of land containing approximately twelve hundred acres, which have never been surveyed by the government of the United States, and which have never been alienated or disposed of by the government of the United States, and is now and ever since has been unsurveyed Government Land, belonging to the Government of the United States as a part of its public domain, and subject to and open for settlement under the homestead laws of the United States.

Mr. Voorhees: We object to that offer, if your honor please, upon the same ground heretofore stated with regard to the last offer exactly, with the exception of the last one, pertaining to the violation of the law of the State of Washington in going back on the land after once being removed under arrest. The offer is to prove the title, and that cannot be done in this action.

Objections sustained. Defendant excepted.

Whereupon defendant submitted testimony of himself and other witnesses showing the amount, quality and character of crops grown and raised by defendants upon the lands in question during the season of 1914, and the value of same and the value of the use and occupation of said lands during the season of 1914, and rested.

24 That as to the consolidated cases, Nos. 44596, 44594, 44580, 44579 and 44581, the same proceedings were had, the same stipulation entered into and the same offers of proof made and testimony upon the damages for the use and occupation of the lands and premises involved was submitted and exhibits offered both on behalf of plaintiffs and defendants as in case of Peter Morrison and Agnes Morrison vs. H. J. Gunning and Ellen E. Gunning, being case No. 44595.

Case closed.

25 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

H. J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Findings of Fact and Conclusions of Law Proposed by Defendants.

The above entitled cause having come regularly on for trial on the 6th day of January, 1915, before the court without a jury, and the plaintiffs appearing by their attorneys, Voorhees & Canfield, and the defendants appearing by their attorneys, Skuse & Morrill, and the court having heard the evidence introduced by both plaintiffs and defendants, and argument by counsel, and having duly considered the same, and being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

Findings of Fact.

1. That at and during all of the times herein mentioned the plaintiffs, Peter Morrison and Agnes Morrison, were, and now are, husband and wife.

2. That Ellen E. Gunning is the true name of the defendant designated in plaintiffs' complaint as Jane Doe Gunning, and that at and during all of the times herein mentioned the defendants, H. J. Gunning and Ellen E. Gunning, have been, and now are, husband and wife.

3. That plaintiffs were for a number of years next prior to the 10th day of March, 1914, and continuously for more than five days preceding said date in the peaceable and undisturbed possession of the land and premises described in the complaint herein, said lands and premises comprising a part of approximately 900 acres enclosed by plaintiffs with a good and substantial fence constructed and maintained by plaintiffs.

26

4. That on the 10th day of March, 1914, at about 2:00 o'clock a. m., in the nighttime, defendants entered upon the premises described in the complaint without permission or authority from plaintiffs and have ever since continuously occupied and remained upon said premises.

5. That on the 3rd day of April, 1914, plaintiffs in writing notified defendants to remove from said premises so occupied by defendants and demanded that defendants surrender said premises to plaintiffs, and that defendants have for a period of more than three days from and after said demand refused to remove therefrom or to surrender the same to plaintiffs.

6. That on the 9th day of April, 1914, plaintiffs filed the original summons and complaint herein, and upon application for a Writ of Restitution of said premises to plaintiffs, an order was on the 10th day of April, 1914, issued from the above entitled court directing and commanding the Sheriff of Spokane County, Washington, to restore to plaintiffs the premises in said complaint described and to oust the defendants therefrom.

7. That on the 13th day of April, 1914, defendants made and filed a bond for the retention of said premises in the amount fixed by the court pursuant to Section 820 of Remington & Ballinger's Code, and elected to continue to retain, and did continue to retain possession of said premises.

8. That upon the trial of said case, plaintiffs failed to prove that they were entitled to the possession of said premises, or any part thereof, at the time of the entry thereon by defendants, or during the time that defendants have been in the possession thereof; and also failed to offer any proof showing, or tending to show, that plaintiffs were entitled to the possession of said premises, or any part thereof, at the time defendants entered thereon, or during the time that defendants have occupied said premises.

27

9. That it does not appear from the evidence submitted in this

case that defendants unlawfully entered upon the premises in question.

10. That it does not appear from the testimony submitted that plaintiffs were lawfully in possession of the premises in question at the time of the entry thereon by defendants.

11. That it does not appear from the testimony submitted that the occupation of said premises by defendants since the 10th day of March, 1914, is, and was, lawful.

12. That the above entitled cause and the following entitled causes were, by agreement of all the parties in open court, tried before the court at the same time and upon the same evidence, to-wit:

Peter Morrison and Agnes Morrison, his wife, v. W. J. Gunning, No. 44579; Peter Morrison and Agnes Morrison, his wife, v. R. E. Wakeley and Addel Wakeley, his wife, No. 44595; Peter Morrison and Agnes Morrison, his wife, v. William E. Sheets, No. 44594; Peter Morrison and Agnes Morrison, his wife, v. John Leipper, No. 44578; Peter Morrison and Agnes Morrison, his wife, v. C. C. McElyea and Grace A. McElyea, his wife, No. 44580; Peter Morrison and Agnes Morrison, his wife, v. A. M. Litton, No. 44581.

Conclusions of Law.

1. That plaintiffs are not entitled to recover in this action.

28 2. That plaintiffs' action should be dismissed.

3. That defendants are entitled to judgment against plaintiffs, dismissing plaintiffs' action with costs.

Done in open court this — day of February, 1915.

—— ——, *Judge.*

Refused, Feb. 18, 1915.

WM. A. HUNEKE, *Judge.*

Service of the within findings of fact and conclusions of law proposed by the defendant and a receipt of a true copy thereof is hereby acknowledged this 17th day of February 1915.

VOORHEES & CANFIELD,
Attorneys for Plaintiffs.

Filed Feb. 18, 1915, at 1:50 o'clock, p. m. Glen B. Creighton, Clerk. E. E. Burton, Deputy.

29 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

H. J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Findings of Fact and Conclusions of Law.

The above entitled cause having come regularly on for trial on the 6th day of January, 1915, before the court without a jury, and the plaintiffs appearing by their attorneys Voorhees & Canfield, and the defendants appearing by their attorneys Skuse & Morrill, and the court having heard the argument by counsel, and having duly considered the same, and being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

Findings of Fact.

1. That at and during all of the times herein mentioned the plaintiff- Peter Morrison and Agnes Morrison were, and now are, husband and wife.

2. That Ellen E. Gunning is the true name of the defendant designated in plaintiffs' complaint as Jane Doe Gunning, and that at and during all of the times herein mentioned the defendants, H. J. Gunning and Ellen E. Gunning, have been, and are now, husband and wife.

3. That the plaintiffs were continuously for a number of years next prior to the 10th day of March, 1914, and continuously for more than five days next preceding the entry by defendants, hereinafter set forth, in the peaceable and undisturbed possession of the following described property situate in the County of Spokane,
30 State of Washington, to-wit:

Beginning at a point where the line between Lots 3 and 4, Sec. 33, Twp. 25 N. of R. 45 E. W. M., projected West intersects the westerly meander line of Saltese Lake, thence northerly to the point where said meander line intersects the West line of said Sec. 33 projected North, thence North on said West line of Sec. 33 so projected to the point where it intersects the North line of said Sec. 33 projected West, thence East on said North line so projected to its intersection with the North and South center line of Sec. 33 projected North, thence South along said center line so projected to the point where same intersects the easterly meander line of Saltese Lake, thence southerly along said meander line to the point where the said center line so projected again intersects said meander line, thence south on said projected center line to the point of intersection

with the line between Lots 1 and 3 of Sec. 33 projected West, thence West on said line between Lots 1 and 3 Sec. 33 so projected about 80 rods and thence South to the intersection with the line between Lots 3 and 4, Sec. 33 projected West, thence West on said line between Lots 3 and 4, Sec. 33, so projected to the point of beginning, being in the bed of Saltese Lake, County of Spokane, State of Washington.

4. That during said possession of said premises, the plaintiffs maintained a good and substantial fence around said premises enclosing the same, and the said fence and possession was so maintained at the time of the entry on said premises by the defendants as hereinafter found.

5. That on the 10th day of March, 1914, at a time when plaintiffs were absent from said premises and during such absence and in the night time at about 2.00 o'clock a. m., the defendants broke the plaintiffs' close so maintained by the plaintiffs, and entered upon the said premises, without permission or authority from plaintiffs, and then continuously occupied and remained upon said premises.

6. That on the 3rd day of April, 1914, plaintiffs in writing notified defendants to remove from said premises and demanded that the defendants surrender the said premises to plaintiffs, and that defendants have for the period of more than three days, to-wit: from the date of said demand, refused to remove therefrom or to surrender the same.

7. That on April 10th, 1914, plaintiffs filed the original
31 summons and complaint herein and made application to the above entitled court for a writ of restitution to the plaintiffs of the premises described in said complaint, and that on said 10th day of April, 1914, an order issued from said court directing the clerk of said court to issue under the seal of said court the writ of restitution directed to the Sheriff of Spokane County, and commanding him to restore to the plaintiffs the premises in said complaint described, and to oust the defendants therefrom and directing plaintiffs to file a bond pursuant to the statute in that regard in the sum of $2,500.00.

8. That pursuant to said order said writ was issued to said sheriff and said bond was duly filed by said plaintiffs on the said 10th day of April, 1914, and said writ was forthwith served upon said defendants by said sheriff.

9. That within three days thereof, to-wit: on April 13th, 1914, defendants made and filed a bond for the retention of the said premises, the amount of which was fixed by this court, pursuant to Section 820 of Remington & Ballinger's Code, and elected to continue to retain, and did continue to retain, and do still retain, possession of said premises.

10. That at the time of the entry and taking possession of the said premises by the defendants, plaintiffs were farming said premises and were preparing to sow the crop thereon, and had cultivated some of said land therefor, and were putting in and would have raised a crop of hay and oats for the season of 1914 last past

thereon, and were prevented from raising, harvesting and selling said crop by said entry and possession of defendants.

11. That plaintiffs, if they had not been prevented by defendants, as aforesaid, would have raised for the season of 1914 on said premises 93 acres of timothy hay at three-fourths of a ton per acre, or 69¾ tons of hay, and 25 acres of oats at 40 bu. per acre,
32 or 16 tons of oats.

12. That the cost of raising, harvesting and marketing said hay would have been $5.00 per ton, or $348.75, and that the cost of raising, harvesting and marketing said oats would have been $10.75 per acre or $268.75.

13. That the market price or value of said hay at the time it would have been harvested and for several months thereafter in the season of 1914 was $13.00 per ton, and that the market price or value of said oats at the time said oats would have been harvested and for several months thereafter was $24.50 per ton, and that said hay and oats, if defendants had not prevented the raising thereof would have been sold for said prices respectively, and would have brought for said hay $906.75 and for said oats $392.00.

14. That the net profits to the plaintiffs on said hay, if they had been permitted to raise, harvest and market the same, would have been $558.00, and that the net profits to plaintiffs, on said oats, if they had been permitted to raise, harvest and market the same, would have been $123.25.

15. That the plaintiffs expended in the preparation of the land for said crop $69.00, and that said net profits and the said sum of $69.00 were lost the plaintiffs through the entry and possession by the defendants, making an aggregate loss or damage to plaintiffs of $750.25.

16. That the defendants, after going into possession, ploughed 25 acres of said land, and that the said ploughing of said land was of the reasonable value of $1.50 per acre, and that said defendants are entitled to credit for the sum of $37.50 to be deducted from the said sum of $730.25 and that the damage to plaintiffs is the sum
33 of $712.75, making a net loss or damage to the plaintiffs of $712.75.

17. That the value of the use and occupation of said premises to plaintiffs is the sum of $712.75.

18. That plaintiffs have claimed double damages in their complaint and supplemental complaint herein, and that double the amount of said net loss, or $712.75, is the sum of $1,425.50.

19. That the above entitled cause and the following entitled causes were, by agreement of all the parties in open court, tried before the court at the same time and upon the same evidence, to-wit:

Peter Morrison and Agnes Morrison, his wife, v. W. J. Gunning, No. 44579.

Peter Morrison and Agnes Morrison, his wife, v. William E. Sheets, No. 44594.

Peter Morrison and Agnes Morrison, his wife, v. R. E. Wakeley and Addel R. Wakeley, his wife, No. 44595.

Peter Morrison and Agnes Morrison, his wife, v. John Leipper, No. 44578.

Peter Morrison and Agnes Morrison, his wife, v. C. C. McElyea, and Grace A. McElyea, his wife, No. 44580.

Peter Morrison and Agnes Morrison, his wife, v. A. M. Litton, No. 44581.

Conclusions of Law.

1. That plaintiffs were the occupants of the said above described premises at the time they were entered upon by the defendants herein, as above set forth, and that defendants unlawfully entered thereon and were and are guilty of forcible detainer against the plaintiffs, and plaintiffs were entitled to possession at the time of such forcible detainer.

2. That plaintiffs are entitled to the immediate possession of said premises above described, and to judgment against defendants for such immediate possession and for restitution thereof, and for the immediate issuance out of this court of a writ of restitution commanding the Sheriff of this County to forthwith restore the said possession to plaintiffs and to oust the defendants from said premises.

34 3. That plaintiffs are entitled to recover against defendants and to judgment therefor, double damages in the sum of $1,425.50, and interest thereon from date of judgment, together with plaintiffs' costs and disbursements herein to be taxed in the sum of $— and to execution therefor.

Done in open court this 18th day of February, 1915.

WM. A. HUNEKE, *Judge.*

Due service of the within by a true copy thereof is hereby accepted at Spokane, Washington, this 4th day of Feb'y 1915.

SKUSE & MORRILL.

Filed Feb. 18, 1915, at 2 o'clock P. M. Glen B. Creighton, Clerk, E. E. Burton, Deputy.

35 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

H. J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Judgment.

The above entitled cause having come regularly on for trial on the 6th day of January, 1015, before the court without a jury, and

the plaintiffs appearing by their attorneys Voorhees & Canfield, and the defendants appearing by their attorneys, Skuse & Morrill, and the court having heard the evidence introduced by both plaintiffs and defendants and argument by counsel, and having fully considered the same, and being fully advised in the premises, and having made and filed herein its findings of fact and conclusions of law, it is

Ordered, and adjudged that the plaintiffs have and recover of the defendants the possession and that plaintiffs be restored to the possession of the following lands and premises situate in the County of Spokane, State of Washington, and more particularly described as follows, to-wit:

Beginning at a point where the line between Lots 3 and 4, Sec. 33, Twp. 25 N. of R. 45 E. W. M., projected West intersects the westerly meander line of Saltese Lake, thence northerly to the point where said meander line intersects the west line of said Sec. 33 projected North, thence North on said West line of Sec. 33 so projected to a point where it intersects the North line of said Sec. 33 projected West, thence East on said North line so projected to its intersection with the North and South center line of Sec. 33 projected North, thence South along said center line so projected to the point where same intersects the easterly meander line of Saltese Lake, thence southerly along said meander line to the point where the said center line so projected again intersects said meander line, thence South on said projected center line to the point of intersection with the line between Lots 1 and 3 of Sec. 33 projected West, thence West on said line between Lots 1 and 3, Sec. 33 so projected about 80 rods, and thence south to the intersection with the line between Lots 3 and 4, Sec. 33 projected West, thence West on said line between Lots 3 and 4, Sec. 33, so projected to the point of beginning, being in the bed of Saltese Lake, County of Spokane, State of Washington.

It is further ordered and adjudged that the clerk of this court do issue under the seal of this court a writ of restitution directed to the Sheriff of Spokane County, commanding him to restore to the plaintiffs the possession of said premises, and to deliver the said possession to the plaintiffs, and to oust the defendants therefrom.

It is further ordered and adjudged that the plaintiffs have and recover of the defendants the sum of $1,425.50 with interest thereon from the date hereof, together with plaintiffs' costs and disbursements taxed at $—, and that execution issue therefor.

Done in open court this 18th day of February, 1915.

WM. A. HUNEKE, *Judge.*

Due service of the within by a true copy thereof is hereby accepted at Spokane, Washington, this 11th day of Feb'y 1915.

SKUSE & MORRILL,
Attorneys for Def't.

Filed Feb'y 18, 1915, at 2 o'clock P. M. Glen B. Creighton, Clerk, E. E. Burton, Deputy.

37 No. 12978.

Department Two.

Filed May 18th, 1916.

PETER MORRISON et ux., Respondents,

v.

H. J. GUNNING et ux., Appellants.

Per Curiam:

The issues and questions presented in this case are the same as in the case of Ridpath v. Denee, 85 Wash. 322; and for the reasons there stated, the judgment must be affirmed.

38 *Authentication of Record.*

SUPREME COURT,
State of Washington, ss:

I, C. S. Reinhart, clerk of said court, do hereby certify that the foregoing pages, numbered from *to* 1 to 37 inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Peter Morrison and Agnes Morrison, his wife, Plaintiffs, vs. H. J. Gunning and Ellen E. Gunning, his wife, Defendants, and also of the opinion of the court rendered therein, as the same now appear of file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Olympia, Washington, this 4th of Jan., 1916.

C. S. REINHART,
Clerk Supreme Court of Washington.

39 In the Supreme Court of the State of Washington.

Friday, July 7th, 1916.

No. 12978.

PETER MORRISON et al., Respondents,

vs.

H. J. GUNNING et al., Appellants.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Spokane County,

and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 7th day of July, A. D. 1916, on motion of Voorhees & Canfield, Esq., of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; the petition for rehearing denied and that the said Peter Morrison et al. have and recover of and from the said H. J. Gunning and Ellen E. Gunning, his wife, and from the Fidelity and Deposit Company of Maryland surety the costs of this action taxed and allowed at Fifty-seven & 80/100 Dollars, and
40 that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

41 In the Supreme Court of the State of Washington.

No. 44595.

PETER MORRISON and AGNES MORRISON, His Wife, Plaintiffs,

vs.

H. J. GUNNING and ELLEN E. GUNNING, His Wife, Defendants.

Petition for Writ of Error, Assignment and Prayer.

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Washington in rendering judgment against them in the above entitled cause, the defendants herein pray a Writ of Error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedea- bond.

And the said H. J. Gunning, and Ellen E. Gunning, his wife, assign the following errors in the records and proceedings in said case.

The supreme court of the State of Washington erred in holding and deciding that the forcible entry and detainer statutes of the State of Washington (Chap. 2, Rem. & Bal. Code) supersede and are paramount to the Federal Homestead Laws of the United States, (Rev. Stat. Sec. 2289 et seq. United States Comp. Stat. 1901, p. 1388, Act, May 14, 1880, 21 Stat. at L. 140 Chap. 89 Sec. 3, U. S. Comp. Stat. 1901, p. 1392: Rev. Stat. Sec. 2266 Act, March 1891, 26 Stat. at L. 1095, Chap. 561 Sec. 5, U. S. Comp. Stat. 1901 p. 1535) and denying to defendants the right to show that the lands in question were unsurveyed public lands of the United States, subject to settlement by defendants under said Federal Homestead Laws as qualified homestead settlers under said laws; and also denying to defendants the right to show their good faith, settlement and
42 residence thereon under said federal homestead laws and also in denying to defendants the right to continue such settlement and residence upon said lands and also in holding and deciding that plaintiffs have the right to the possession and the use

and occupation of said lands to the exclusion of the defendants; and also denying the right of defendants to prove that plaintiffs were in possession of a large tract of unsurveyed government land unlawfully and that they were not qualified to enter upon, use and occupy said lands under said Federal Homestead Laws, or any laws of the United States, and trespassers upon public lands of the United States.

These errors are more particularly set forth as follows:

The Supreme Court of the State of Washington erred in holding and deciding,

First. In holding and deciding that defendants were not entitled to prove the allegation of affirmative defense, namely: that the lands in question were unsurveyed, unappropriated public lands of the United States and a part of the public domain subject to settlement under the homestead laws of the United States: that on October 30, 1909, H. J. Gunning, the defendant, in good faith for the purpose of making his homestead entry thereon and acquiring title thereto, made settlement upon said lands and has never abandoned the same and is residing thereon in good faith under the homestead laws of the United States: that at the time of making such settlement, he was over twenty-one years of age, a native born citizen of the United States, not the proprietor of over 160 acres of land in any state or territory, and had never made entry of public lands under the homestead laws of the United States, and was qualified to make settlement upon and entry of public lands and acquire title thereto; that at the time he made settlement and established his residence upon said lands, the plaintiff was not in possession of any part thereof, and claimed no rights therein; that the plaintiffs are now wrongfully and unlawfully and without any right so to do, attempting to
43 prevent defendants from maintaining their residence thereon, and acquiring title thereto; that the lands involved in the complaint are a part of a contiguous body of lands containing approximately 1200 acres, which has never been surveyed by the government of the United States, but is unsurveyed and unappropriated public lands belonging to the United States and open for settlement.

Second. In sustaining the decision of the Superior Court in striking from the affirmative defense from defendant's answer and denying defendant the right to prove the allegations thereof.

Third. In not finding and deciding that defendants were entitled at the trial of the case to prove the qualifications of the defendant, H. J. Gunning, as a homestead settler under the Federal Homestead Laws; that the lands in question were unsurveyed public lands of the United States, and the settlement and residence thereon by defendant as a homestead settler under said Federal Homestead Laws.

Fourth. In denying to defendants by said decision the right to occupy and reside upon the lands in question; such right being granted to defendants under the provisions of the homestead laws of the United States and the decisions of the United States Supreme Court.

Fifth. In denying to defendants the right to prove that plaintiffs were holding and occupying the lands in question as against defend-

ants, in violation of the act of congress, approved February 25, 1885 (23 St. at L. 321).

Sixth. In not finding and deciding that the enforcement of the forcible entry and detainer laws of the State of Washington (Chap. II, Title VI, Rem. & Bal. Codes) in favor of the plaintiffs would deprive the defendants of their substantial rights guaranteed them under the homestead laws of the United States, and therefore said laws of the State of Washington could not be enforced against the defendants.

44 For which errors the defendants H. J. Gunning and Ellen E. Gunning, his wife, pray that said judgment of the Supreme Court of the State of Washington, dated the 7th day of July, 1916, be reversed and a judgment rendered in favor of defendants for their costs.

FRED B. MORRILL,
JOHN J. SKUSE,
Attorneys for H. J. Gunning and Ellen E. Gunning, His Wife.

STATE OF WASHINGTON,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by H. J. Gunning and Ellen E. Gunning, his wife, to Peter Morrison, and Agnes Morrison, his wife, in the sum of One Thousand Dollars ($1000.00.)

Dated Dec. 5th, 1916.

GEO. E. MORRIS,
Chief Justice Supreme Court of State of Washington.

45 In the Supreme Court of the State of Washington in and for the county of Spokane.

No. 12978.

H. J. GUNNING and ELLEN E. GUNNING, His Wife, Plaintiffs in Error,

vs.

PETER MORRISON and AGNES MORRISON, His Wife, Defendants in Error.

Bond.

Know all men by these presents, that we, H. J. Gunning and Ellen E. Gunning, his wife, as principals and the Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Peter Morrison and Agnes Morrison, his wife, in the sum of One Thousand ($1000.00) Dollars, to be paid to the said

Peter Morrison and Agnes Morrison, his wife, to which payment, well and truly to be made, we bind ourselves jointly and severally by these presents.

Sealed with our seals, and dated this 12th day of December 1916.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Washington.

Now therefore, the condition of this obligation is such, that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged not exceeding said sum of One Thousand ($1000.00)
46 Dollars if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

H. J. GUNNING,
ELLEN E. GUNNING,
By SKUSE & MORRILL, *Their Attorneys.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By W. L. BERRY, *Its Attorney in Fact.*

Attest:
HARRY E. ——,
General Agent.

Bond Approved, and to operate as a Supersedeas.
Dated the 21st day of Dec. 1916.

GEO. E. MORRIS,
Chief Justice of the Supreme Court of Washington.

Endorsed: Filed — 18, 1916. C. S. Reinhart, Clerk.

47 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before, you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Peter Morrison and Agnes Morrison, his wife, and H. J. Gunning, and Ellen E. Gunning, his wife, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under said State, repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the

constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said H. J. Gunning, and Ellen E. Gunning, his wife, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this
48 behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of December 1916.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk District Court United States, Western District of Washington, Northern Division.

Allowed.
GEO. E. MORRIS,
Chief Justice Supreme Court of Washington.

[Endorsed:] 12978. Filed in Supreme Court of Washington, Dec. 18, 1916. C. S. Reinhart, Clerk.

49 *Certificate of Lodgment.*

SUPREME COURT STATE OF WASHINTON, *ss:*

I, C. S. Reinhart, clerk of the said court, do hereby certify that there was lodged with me as such clerk on Dec. 18th, 1916, in the matter of Peter Morrison and Agnes Morrison, his wife, versus H. J. Gunning, and Ellen E. Gunning, his wife;

1. The original bond of which a copy is herein set forth.
2. Three copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Olympia, Washington, this 5th day of Jan. 1917.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk Supreme Court of Washingon.

50 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Peter Morrison and Agnes Morrison, His Wife, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Washington wherein H. J. Gunning, and Ellen E. Gunning, his wife, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the State of Washington, this 21 day of Dec. 1916.

GEO. E. MORRIS,
Chief Justice Supreme Court of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk Supreme Court of Washington.

Spokane, Washington,
Jan'y 4th, 1917.

We, attorneys of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

REESE H. VOORHEES,
H. W. CANFIELD,
Attorneys for Peter Morrison and Agnes Morrison.

51 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Washington, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceeding in the within entitled case, together with all things concerning the same, so far as the same are necessary in the hearing of said suit.

In witness whereof, I hereunto subscribe my name and affix the

seal of said Supreme Court of Washington, in the City of Olympia, this 4th day of Jan. 1916.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk Supreme Court of Washington.

Costs of Suit.

Plaintiffs' costs $—, Paid by Peter Morrison and Agnes Morrison, his wife.

Defendants' costs $—, Paid by H. J. Gunning and Ellen E. Gunning, his wife.

Costs of Transcript $8.30, Paid by H. J. Gunning and Ellen E. Gunning, his wife.

C. S. REINHART, *Clerk.*

52 In the Supreme Court of the State of Washington.

No. —.

PETER MORRISON and AGNES MORRISON, His Wife, Respondents,

vs.

H. J. GUNNING and ELLEN E. GUNNING, His Wife, Appellants.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled case, so far as the same is necessary under the hearing of the Writ of Error herein issued out of the Supreme Court of the United States to this Court, as the same now appears of record in my office, and as I am required to transmit to the Supreme Court of the United States. And I hereby transmit such transcript, together with the original citations and the original Writ of Error, to the Supreme Court of the United States.

In testimony hereto, I have hereunto set my hand and affixed the seal of said Supreme Court at Olympia, Washington, this 4th day of January, 1916.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 25,822. Washington Supreme Court. Term No. 992. H. J. Gunning and Ellen E. Gunning, his wife, plaintiffs in error, vs. Peter Morrison and Agnes Morrison, his wife. Filed March 13th, 1917. File No. 25,822.

INDEX.

	Pages.
General Statement of the Case	1 to 11
Complaint of defendants in error	1 and 2
Answer of plaintiffs in error	2
Affirmative Defenses of plaintiffs in error	2 to 7
Defendants' in error Motion to Strike	7
Supplemental Complaint of defendants in error	7
Answer to Supplemental Complaint	7 to 8
Offer of Proof made by plaintiffs in error	8 to 11
Specification of Errors	11 to 28
Affirmative Defenses as set forth in specification of errors	13 to 21
Offer of Proof made by plaintiffs in error as set forth in specification of errors	21 to 25
Findings of Fact and Conclusions of Law proposed by plaintiffs in error as shown in specifications of error	25 and 26
Conclusions of Law as made by the trial court as set forth in specification of errors	26 and 27
Argument on the question that the Acts of Congress pertaining to public lands supersedes any forcible entry and detainer States statutes	28 to 32
Federal Homestead Laws	32 to 35
That defendants in error are unlawfully withholding the lands in question	35 to 37
Rights of plaintiffs in error as homestead settlers	37 to 42
That plaintiffs in error made a valid settlement upon the lands in question, notwithstanding their enclosures by defendants in error	42 to 44
Decisions of the Land Department are entitled to great respect at the hands of the court	44 to 46
No entry or record can be made at the Land Department by a settler on lands that are unsurveyed, and the only way that plaintiffs	

Pages.

in error could acquire any right to the lands in question was by going thereon and making settlement and establishing their residence ---------- 46 to 47
The action of defendants in error should be dismissed for want of jurisdiction---------- 50 and 51
Under the decision of the State Supreme Court in this case trespassers upon the public domain are protected to the exclusion of good faith would-be settlers---------- 51 and 52

LIST OF CASES CITED.

	Pages.
Act of May 14, 1881 (21 Stat. L. 140)	34
Act of Feby. 25, 1885 (23 Stat. L. 321-22)	36
Anderson vs. Carkins, 135 U. S. 483 (43 L. Ed. 272)	40
Bohall vs. Dilla, 114 U. S. (29 L. Ed. 661)	40
Bogan vs. Edinburgh Am. Land Mtg. Co., 27 U. S. Appeals, 346	45
Commager vs. Dicks, 28 Pac. 864	50
Gauthier vs. Morrison, 232 U. S. 452	38
Hastings and Dak. R. Co. vs. Whitney, 132 U. S. 366 (33 L. Ed. 363)	44
Hebeisen vs. Hatchell, 69 Pac. 888	50
Jones vs. Kirby, 13 L. D. 702	42
Mondou vs. N. Y. N. H. & H. R. Co., 223 U. S. 1 (56 L. Ed. 327)	37
Moss vs. Dowman, 176 U. S. 413 (44 L. Ed. 526)	40
Norton vs. Westbrook, 9 L. D. 455	42
Sec. 3, Art. IV, Const. U. S.	30
Sec. 2289, U. S. Rev. Stat.	32
Sec. 2291, U. S. Rev. Stat.	33
Sec. 2266, U. S. Rev. Stat.	34
Secs. 810-11-12, R. & B. Ann. Codes	48
Shepley vs. Cowan, 91 U. S. 330 (23 L. Ed. 424)	40
Stovall vs. Heenan, 12 L. D. 382	42
Stoddard vs. Neigle, 7 L. D. 340	42
Streeter vs. Rolph, 14 N. W. 166	51
Thompson vs. Holyroyd, 29 L. D. 362	42
Wheeler vs. Rodgers, 28 L. D. 250	42
U. S. vs. Waddell et al., 112 U. S. 76 (28 L. Ed. 673)	41

tiffs in error in writing to remove from said lands and to surrender the same, and that plaintiffs in error have for a period of more than three days from the date of such demand refused to remove therefrom or surrender the same. The prayer for judgment is for the restitution of the premises for an order of the court for a Writ of Restitution restoring to defendants in error the lands in question and for double damages in the sum of $2800.00. (Rec. pp. 1, 2.)

In answer to the complaint, plaintiffs in error admit that they are occupying and in the possession of the premises in question, and further admit that on or about the 3rd day of April, 1914, defendants in error notified them, in writing, to remove therefrom, and also admit that they have failed and refused to do so, or to surrender same to defendants in error, and also deny the damages to defendants in error as alleged in said complaint. (Rec. p. 3.)

As an affirmative defense plaintiffs in error alleged that the lands in question are and ever have been unsurveyed, unappropriated lands of the United States, and a part of its public domain and subject to settlement under the Federal Homestead laws; that said lands are and for many years last past have been good agricultural lands susceptible of cultivation and of being farmed and cultivated to crops; that on or about the 30th day of October, 1909, plaintiff in error, Henry J. Gunning, in good faith as a set-

tler under the Federal Homestead laws, for the purpose of making a homestead entry thereon and acquiring title thereto from the United States under said laws, made settlement upon the lands in question and has never since abandoned said settlement and is still occupying and residing upon said lands in good faith under said laws; that at the time said plaintiffs in error made such settlement there was no one residing upon said lands, or had prior thereto settled thereon claiming same under any law of the United States, nor were there any improvements thereon made by any person claiming same as a settler under the Federal Homestead laws or under any law of the United States, and that plaintiffs in error are and always have been the only persons occupying said lands or any portion thereof under said Homestead laws, or under any law of the United States; that at the time of making such settlement said plaintiff in error was over the age of twenty-one years; the head of a family; a native-born citizen of the United States, and was not the proprietor of over 160 acres of land in any state or territory of the United States, and had never made any entry upon public lands under the Homestead laws of the United States, and was, and is, in every way qualified to make settlement upon, and entry of, public lands and acquire title thereto from the United States under said Homestead laws; that in making said settlement on the 30th day of October, 1909, plaintiffs in error erected upon said

lands, a house suitable for habitation at any and all seasons of the year and furnished same with all necessary cooking and household utensils, and established their residence thereon and have never since the 30th day of October, 1909, voluntarily abandoned their settlement and residence upon said lands; that such settlement and residence were made in good faith with the bona fide intention to occupy and reside upon said lands and cultivate same, as required under the Federal Homestead laws, with the full intention to occupy, improve and reside thereon and comply with all of the requirements of said laws and for no other purpose; that in order to comply with the requirements of the Homestead laws of the United States and acquire title to said lands under said laws, it becomes and is necessary for plaintiffs in error to reside upon and cultivate said lands and have the possession thereof for a period of five years, and unless they can so reside upon, cultivate and have possession thereof for and during said period of time, they cannot comply with the requirements of the Homestead laws of the United States and sustain and maintain their rights to said lands and acquire title thereto from the Government of the United States, under said Homestead laws.

That defendant in error, Peter Morrison, without any right so to do has for several seasons wrongfully and unlawfully cropped said lands and ever since plaintiffs in error made settlement and established their

residence thereon, on the 30th day of October, 1909, said Peter Morrison and others, at his instigation and for and on his behalf have for the purpose of preventing plaintiffs in error from continuing their settlement and residence upon said lands, as required by the Federal Homestead laws, and to prevent plaintiffs in error from acquiring title thereto under said laws, and in order that said defendants in error may continue to wrongfully and unlawfully crop and cultivate said lands, have wrongfully and unlawfully hindered and delayed plaintiffs in error in their settlement and residence upon said lands, and did remove said plaintiffs in error's house from said lands, together with their household and personal property, and by reason thereof plaintiffs in error have been required to and have constructed another house thereon, and said defendant in error, Peter Morrison, has wrongfully and unlawfully delayed plaintiffs in error in maintaining and continuing their settlement and residence upon said lands, and plaintiffs in error have been greatly hindered and prevented from continuing their settlement upon said lands by said defendants in error, and this action has been brought and is being prosecuted by defendants in error for the purpose of hindering and preventing plaintiffs in error from continuing their settlement and residence upon said lands, as homestead settlers under the Homestead laws of the United States, and to prevent them from acquiring title to said lands under said laws and for

no other purpose, in order that defendants in error may continue to wrongfully and unlawfully crop, and cultivate said lands and derive a profit therefrom. That by virtue of their settlement and residence as aforesaid, plaintiffs in error are entitled to keep, occupy and control said lands, and to the possession thereof, and to reside thereon and make same their home and place of residence under the Homestead laws of the United States; that said defendant in error, Peter Morrison, is wrongfully and unlawfully interfering with plaintiffs in error and preventing them from exercising their rights under said Homestead laws; that said defendants in error, or either of them have never made settlement upon said lands or upon any part or portion thereof, or resided thereon and have never attempted to occupy or improve the same or claim any right thereto under the Federal Homestead laws or under any law of the United States, and said defendants in error, or either of them, are not and have not been during the time herein mentioned qualified to settle upon said lands under the Homestead laws of the United States and acquire title thereto under said laws or under any law of the United States, and have not and never have had any right, title or interest in and to said lands or the possession thereof under any claim or right acquired from the United States, or under any law of the United States, and their acts in cultivating and cropping said lands is a trespass upon the public lands and is and was unlawful; that

the use and occupation of said lands by plaintiffs in error is of great value to them. (Rec. p. 3.)

To said affirmative defense, defendants in error moved to strike each and every paragraph and part thereof for the reason that the defenses therein contained are irrelevant, redundant and immaterial. (Rec. pp. 8, 9.)

This motion was brought on to be heard and after argument thereon was by the court allowed and all of said affirmative defenses stricken; to which exceptions were allowed plaintiffs in error. (Rec. p. 9.)

Thereafter and on the 5th day of November, 1914, defendants in error served and filed their supplemental complaint, wherein among other things it was alleged that at the time of the entry and taking possession of the lands by plaintiffs in error, the defendants in error were farming the same and preparing to plant a crop thereon, and would have raised a crop thereon during the season of 1914, and that by reason of being prevented from raising such crop, defendants in error were damaged in the sum of $1571.00 and prayed for judgment for an order of the court for a Writ of Restitution, restoring to defendants in error said lands and premises and for double damages in the sum of $3143.20. (Rec. pp. 10-11.)

To which supplemental complaint plaintiffs in error

served and filed their answer by which they admitted paragraph one and denied paragraph two thereof. (Rec. p. 12.)

Upon the trial of the case plaintiff in error, Henry J. Gunning, after stating his residence and occupation, was questioned as follows:

> "You may state, Mr. Gunning, for what purpose you entered upon the land in question on the 10th day of March, 1914."

To which counsel for defendants in error objected as irrelevant and immaterial, and such objections were sustained. (Rec. p. 14.)

Thereupon plaintiffs in error offered to prove to the court by said witness, that on the 30th day of October, 1909, he was of the age of twenty-one years; the head of a family; a native-born citizen of the United States, and not the proprietor of more than 160 acres of land in any state or territory of the United States, and had never prior to said date made any entry upon public lands under the Federal Homestead laws, or settled thereon as a homestead settler under said laws, and then and there was and now is in every way qualified to make settlement upon and entry of public lands of the United States, and acquire title thereto under the Federal laws; that on said date he in good faith as a homestead settler and for the purpose of making homestead entry and acquiring title to the lands in question from the Gov-

ernment of the United States under said laws, made settlement upon said lands and all thereof, and has never since voluntarily abandoned said settlement and is still occupying said lands and all thereof in good faith as a settler under the Federal Homestead laws; that at the time he settled thereon there was no one residing thereon, claiming same under said laws or under any law of the United States, nor were there any improvements thereon made by any person claiming said lands as a settler under said laws or under any law of the United States; and that said plaintiff in error ever since has been and still is the only person occupying said lands or any part thereof under said Homestead laws, or under any law of the United States; that in making his said settlement he erected upon said lands a lumber house suitable for habitation in any and all seasons of the year and furnished the same with the necessary cooking and household utensils and entered into the possession and occupation of said house and lands and established his residence thereon on said 30th day of October, 1909, and has never since voluntarily abandoned same; that his settlement and residence thereon was made in good faith with the bona fide intention of continuing to reside upon and occupy said lands and improve the same as required by the Homestead laws of the United States, and to comply with all the requirements of said laws and for no other purpose; that said lands are and were at the time the said

plaintiff in error made his settlement and established his residence thereon, good agricultural lands and only valuable for agricultural purposes; that on the 9th day of November, 1909, plaintiffs in error were at the instigation of defendants in error removed from said lands and their house and improvements removed therefrom, and that they were not able to return to said lands and again take up their residence thereon until the 10th day of March, 1914, at which time they returned to said lands and constructed a good habitable housse thereon and have resided thereon ever since. (Rec. pp. 14-15.)

To this offer of proof objections were made on the part of defendants in error and sustained. (Rec. p. 15.)

Thereupon plaintiffs in error offered to prove to the court by the testimony of H. T. Cole, the Register of the United States Land Office at Spokane, Washington, and by the official records of said land office, that the lands and premises in question were a part of a contiguous body of land containing approximately 1200 acres, which had never been surveyed by the Government of the United States, and which have never been alienated or disposed of by the Government of the United States, and is now and ever has been unsurveyed Government lands belonging to the Government of the United States, as a part of its public domain and subject to, and open

for, settlement under the Homestead laws of the United States. (Rec. pp. 15-16.)

To which offer of proof objections were made on the part of defendants in error and objections sustained. (Rec. p. 16.)

Upon all of the testimony submitted, plaintiffs in error submitted Findings of Fact and Conclusions of Law, all of which were denied by the court. (Rec. pp. 16-17-18.)

Thereupon Findings of Fact and Conclusions of Law in favor of defendants in error were made by the court and judgment thereon entered in favor of defendants in error and against plaintiffs in error. (Rec. pp. 19-23.)

From the rulings and orders of the court and from the judgment entered in favor of defendants in error and against plaintiffs in error, an appeal was taken to the Supreme Court of the State of Washington, which court on the 18th day of May, 1916, filed its decision, sustaining the judgment of the lower court. (Rec. p. 24.)

The cause is now before this court upon a Writ of Error.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the State of Washington

erred in holding and deciding that the forcible entry and detainer statutes of the State of Washington (Chap. 2, Rem. & Bal. Codes) supersede and are paramount to the Federal Homestead laws of the United States (Rev. Stats., Sec. 2289 *et seq.*; U. S. Comp. Stats. 1901, p. 1388, Act May 14, 1880; 21 Stat. At. L. 140, Chap 89, Sec. 3, U. S. Comp. Stats. 1901, p. 1392; Rev. Stat., Sec. 2266, Act March 3rd, 1891; 26 Stat. At. L. 1095, Chap. 561, Sec. 5; U. S. Comp. Stats. 1901, p. 1535); and denying to plaintiffs in error the right to show that the lands in question were unsurveyed public lands of the United States, subject to settlement by plaintiffs in error under said Federal Homestead laws, as qualified homestead settlers thereunder, and also denying to them the right to show their good faith, settlement and residence thereon under said laws; and also denying to plaintiffs in error the right to continue such settlement and residence upon said lands, and also in holding and deciding that defendants in error have the right to the possession and to the use and occupation of said lands to the exclusion of plaintiffs in error; and also denying the right to plaintiffs in error to prove that defendants in error were in the possession of a large tract of unsurveyed government land unlawfully and that they or either of them were not qualified to enter upon, use and occupy said lands under such Homestead laws, or under any law of the United States, and were trespassers upon public lands of the United States.

II.

In sustaining the decision of the Superior Court in striking the affirmative defense from the answer of plaintiffs in error, wherein they alleged as follows:

That in the year 1877, the Government of the United States caused to be surveyed Townships 24 and 25 North, of Range 45, E. W. M., with the exceptions as hereinafter set forth, the same being surveyed during the year above mentioned by a surveyor employed for that purpose by the Government of the United States, under a contract entered into between the United States and said surveyor. That in violation of said contract and of his duty in making the survey of said townships, the said surveyor inadvertently or fraudulently failed and neglected to survey a portion of Sections 4 and 5 in Township 24 and a portion of Sections 20, 28, 29, 32 and 33 in said Township 25, North of Range 45, E. W. M., containing approximately 1200 acres in a contiguous body, or any part thereof, and no part thereof has since been surveyed by the Government of the United States, and all of said lands not surveyed, as aforesaid, ever since have been, and now are, unsurveyed, unappropriated Government lands of the United States, belonging to the Government of the United States as a part of its public domain, subject to, and open for settlement under the Homestead laws of the United States, and the lands and premises set forth and described in plaintiffs' complaint form and are

a part of said tract of land in said township not surveyed as aforesaid. That said lands not surveyed, as aforesaid, are, and for many years last past have been, good agricultural lands susceptible of cultivation and susceptible of being farmed and cultivated to hay, grain and other agricultural crops, and were at the time of the survey of other lands in said township, as aforesaid, of such a character as should have been, under the laws governing the survey of public lands, surveyed as a part of the public domain of the United States.

That on the 30th day of October, 1909, defendants, in good faith as homestead settlers, and for the purpose of defendant, Henry J. Gunning, thereafter making a homestead entry thereon and acquiring title thereto from the Government of the United States under the Homestead laws, made settlement upon the lands described in plaintiffs' complaint, and all thereof, and have never since abandoned such settlement, and are still occupying said land, and all thereof, as homestead settlers thereon in good faith under the Homestead laws of the United States, and not otherwise.

That at the time defendants made settlement upon said lands as aforesaid, there was no one residing thereon, or on any portion thereof, and no other person had prior thereto settled upon said land, or any part or portion thereof, claiming same as a homestead settler under the Homestead laws of the United

States, or under any laws of the United States, and there was not, at the time defendants settled upon said land as aforesaid, any improvements thereon, or upon any part or portion thereof, made by any person claiming said land as a settler under the Homestead laws of the United States, or under any law of the United States, and defendants were, at the time of such settlement and ever since have been, and still are, the only persons occupying such lands, or any portion thereof, under the Homestead laws of the United States, or under any law of the United States.

That at the time of making such settlement, defendant, Henry J. Gunning, was over the age of twenty-one years, the head of a family, a native-born citizen of the United States, and was not the proprietor of over 160 acres of land in any state or territory of the United States, and had never prior thereto made any entry upon public lands under the Homestead laws of the United States, and then was and now is, in every way, qualified to make settlement upon, and entry of public lands and acquire title thereto from the Government of the United States, under the Homestead laws of the United States.

That in making said settlement, upon said land, as aforesaid, defendants on the 30th day of October, 1909, erected upon said tract of land a frame, lumber house with door, window and floor, suitable for habi-

tation at any and all seasons of the year. That they then and there upon said date furnished said house with all necessary cooking and household utensils, and entered into the possession and occupation of said house and established their residence therein, and are now residing upon said land, under said settlement, and have never since said 30th day of October, 1909, voluntarily abandoned their said settlement and residence upon said land. That in making settlement upon, and in residing upon, said land, as aforesaid, defendants did so in good faith with the bona fide intention to continue to reside upon and occupy said land, and cultivate the same, as required under the Homestead laws of the United States, and defendants settled upon and established their residence upon said land with the full intention to occupy, improve and reside thereon and comply with all requirements of the Homestead laws of the United States, and for no other purpose. That in order to comply with the requirements of the Homestead laws of the United States and acquire title to said land, so settled upon by defendants, as aforesaid, under said laws it becomes and is necessary for defendants to reside upon and cultivate said lands, and have possession thereof, for a period of five years, and unless defendants can so reside upon, cultivate and have possession of said land for and during said period of time, said defendants canont comply with the requirements of the Homestead laws of the United States, and sus-

tain and maintain their rights to said land, and acquire title thereto, from the Government of the United States under the Homestead laws of the United States.

That plaintiff, Peter Morrison, without any right so to do, has for several seasons last past wrongfully and unlawfully cropped and harvested hay upon said land, and ever since defendants made settlement and established their residence upon said land, on the 30th day of October, 1909, as aforesaid, said plaintiff, Peter Morrison, and others, at his instigation, and acting for and on his behalf, have for the purpose of preventing defendants from continuing their settlement and residence thereon as required by the Homestead laws of the United States and to prevent defendants from acquiring title to said lands, under the Homestead laws of the United States, and for the purpose of harassing and annoying defendants, and in order that said plaintiff may continue to wrongfully and unlawfully crop, and cultivate said land, and to cut and harvest the hay growing thereon for his own profit, and for the purpose of harassing and annoying defendants, have wrongfully and unlawfully hindered and delayed defendants in their settlement and residence on said land, and at one time, to-wit: during the month of November, 1909, wrongfully and unlawfully caused the arrest of defendant Henry J. Gunning for unlawful trespass upon said land, and during the temporary absence of de-

fendant from said land, caused by reason of such arrest, by force and against the will of defendants, removed defendants' house from said land and removed from said land all of defendants' household and personal property and did threaten said defendant Henry J. Gunning with further arrest and imprisonment, and said plaintiff, Peter Morrison, and others, acting for and in his behalf and at his instigation, have wrongfully sought to have said defendant, Henry J. Gunning, arrested and made complaint to the prosecuting attorney in and for Spokane County, Washington, and endeavored to have said prosecuting attorney approve the issuance of a warrant for the arrest of said defendant, upon the false charges that said defendant was unlawfully trespassing upon the lands and premises of said plaintiff, and by the removal of defendants' house and household and personal effects from said land, defendants have been required to and have constructed another house thereon ,and said plaintiff, Peter Morrison, has wrongfully and unlawfully delayed these defendants in maintaining and continuing their settlement and residence upon said land by reason of the unlawful and wrongful acts of said plaintiff and others, and defendants have thereby been greatly hindered and prevented from at all times continuing their settlement and residence upon said land since first making settlement and establishing their residence thereon, and this action has been brought and is being prosecuted

by plaintiffs for the purpose of further harassing, annoying, hindering and preventing these defendants from continuing their settlement and residence upon said land, as homestead settlers thereon under the Homestead laws of the United States, and to prevent the defendants from acquiring title thereto under the Homestead laws of the United States, and for no other purpose, in order that plaintiffs may continue to wrongfully and unlawfully crop and cultivate the same and derive a profit therefrom.

That by virtue of the settlement and residence upon said land by defendants, as aforesaid, defendants are entitled to use, occupy and control the same, and to the possession thereof, and entitled to reside thereon, and make same their home and place of residence under the Homestead laws of the United States, and said plaintiff, Peter Morrison, by reason of his acts, as hereinbefore set forth, is wrongfully and unlawfully interfering with the defendants and preventing them from exercising their rights under the Homestead laws of the United States. That plaintiff, or either of them, have never made settlement upon said land, or upon any part or portion thereof, or resided thereon, and have never attempted to use, occupy or improve the same, or to claim any right thereto, under the Homestead settlement laws of the United States or under any law of the United States, and said plaintiffs, or either of them, are not, and have not been during the time herein mentioned,

qualified to settle upon said land under the Homestead laws of the United States, and acquire title to said land under the Homestead laws of the United States, or under any law of the United States, and said plaintiffs have not, and never have had, any right, title or interest in and to said land, or any right to the possession thereof, or any part thereof, under any claim or right acquired from the Government of the United States, or under any law of the United States, and all of the acts of plaintiffs in cultivating said land and cropping the same, as hereinbefore set forth, constitute, and are, a trespass upon the public lands of the United States, and are, and were, unlawful and by and through which plaintiffs never acquired, and cannot acquire, any right or interest in and to said land or to the rightful or lawful possession thereof, or to any part thereof.

That on or about the 10th day of April, 1914, while these defendants were occupying said land and residing thereon as hereinbefore set forth, the plaintiff, Peter Morrison, wrongfully and unlawfully entered thereon and commenced to cultivate said land, and to seed the same to crop with the wrongful and unlawful purpose of growing and harvesting a crop of grain and hay thereon during the season of 1914, and notwithstanding the objections and protests of defendants, said plaintiff has seeded a portion of said land to crop, and has continued to harass, annoy and

delay the defendants in their settlement and occupation of said land.

That hereto attached, and made a part hereof, is a true and correct plat of Township 25 North, Range 45, E. W. M., certified to as such by Hal J. Cole, Register of the United States Land Office of Spokane, Washington, showing the lands in Sections 20, 28, 29, 32, and 33 in said township, not surveyed at the time of the Government survey of said township, the lands described in plaintiffs' complaint being a part thereof and not surveyed as shown by said plat.

That the use and occupation of said land by defendants is of great value to defendants, and the acts of plaintiffs, as set forth have, and are causing defendants great loss and injury, to-wit: in the sum of three thousand five hundred dollars. (Rec. pp. 3-7.)

III.

In sustaining the decision of the Superior Court in rejecting evidence offered by plaintiffs in error, as follows:

"Mr. Morrill: This defendant at this time offers to prove and show to the court by his own testimony that on the 30th day of October, 1909, he was over the age of twenty-one years, the head of a family, a native-born citizen of the United States and not the proprietor of more than one hundred sixty acres

of land in any state or territory of the United States, and had never prior to said date made any entry upon public land under the Homestead laws of the United States, or settled thereon as a homestead settler under the Homestead laws of the United States, and then and there, was and now is, in every way qualified to make settlement upon, and entry of, public lands of the United States, and acquire title thereto under the Homestead laws of the United States. That on the 30th day of October, 1909, this defendant in good faith as a homestead settler, and for the purpose of making homestead entry and acquiring title to the lands in question from the Government of the United States under the Homestead laws of the United States, made settlement upon the lands in question and all thereof, and has never since voluntarily abandoned his settlement thereon, and is still occupying said lands, and all thereof, as a homestead settler in good faith under the Homestead laws of the United States. That at the time said defendant settled upon said lands there was no one residing thereon or upon any part or portion thereof, and no person had prior thereto settled upon said lands or upon any part or portion thereof claiming same under the Homestead laws of the United States, or under any law of the United States, and there was not at the time this defendant made settlement upon said lands any improvements thereon or upon any part or portion thereof made by any person claiming said lands as

a settler under the Homestead laws of the United States, or under any law of the United States, and that this defendant was at the time of making such settlement, and ever since has been, and still is, the only person occupying the lands in question or any part thereof, under the Homestead laws of the United States, or under any law of the United States. That in making his said settlement upon said land, defendant, on the 30th day of October, 1909, erected thereon a frame, lumber house with doors, windows and floors, suitable for habitation at any and all seasons of the year; that he then and there upon said date furnished said house with the necessary cooking and household utensils and entered into the possession and occupation of said house, and established his residence therein and is now residing upon said tract and has never since said 30th day of October, 1909, voluntarily abandoned the same. That in making settlement upon and in residing upon said land, defendant did so in good faith with the bona fide intention of continuing to reside upon and occupy said lands and cultivate and improve the same as required by the Homestead laws of the United States, and comply with all the requirements of the Homestead laws of the United States, with the full intention and purpose of occupying and residing thereon and complying with all the requirements of the Homestead laws of the United States, and for no other purpose. That said lands are and were at the time the de-

fendant made his settlement and established his residence thereon, good agricultural lands, susceptible of beiny farmed and cultivated as other agricultural lands, and only valuable for agricultural purposes, and that the only use said lands can be put to is for farming purposes, for the raising of agricultural crops thereon. That after establishing his residence upon said lands, defendant resided thereon until the 9th day of November, 1909, at which time he was arrested at the instigation of the plaintiff and removed from the said land, and his house and improvements were also removed therefrom, and the defendant was not able to return to said land and again take up his residence thereon until the 10th day of March, 1914, at which time he returned to said land and constructed a good habitable house thereon and has resided thereon and upon said land ever since as a bona fide settler under the Homestead laws of the United States, for the purpose of acquiring title to said lands under such laws, and for no other purpose." (Rec. pp. 14-15.)

IV.

In sustaining the decision of the Superior Court in rejecting evidence offered by plaintiffs in error, as follows:

"Mr. Morrill: The defendant at this time also offers to prove and to show to the court by the testimony of H. T. Cole, the Register of the United States

Land Office at Spokane, Washington, and by the official records of said Land Office, that the lands and premises in question were a part of a contiguous body of land containing approximately twelve hundred acres, which have never been surveyed by the Government of the United States, and which have never been alienated and disposed of by the Government of the United States, and is now and ever since has been unsurveyed Government land, belonging to the Government of the United States, as a part of its public domain, and subject to and open for settlement under the Homestead laws of the United States." (Rec. pp. 15-16.)

V.

In sustaining the Superior Court in refusing the Findings of Fact and Conclusions of Law, proposed by plaintiffs in error, as follows:

8. That upon the trial of said case, plaintiffs failed to prove that they were entitled to the possession of said premises, or any part thereof at the time of the entry thereon by defendants, or during the time that defendants have been in the possession thereof; and also failed to offer any proof showing, or tending to show, that plaintiffs were entitled to the possession of said premises, or any part thereof, at the time defendants entered thereon, or during the time that defendants have occupied said premises.

9. That it does not appear from the evidence submitted in this case that defendants unlawfully entered upon the premises in question.

10. That it does not appear from the testimony submitted that plaintiffs were lawfully in possession of the premises in question at the time of the entry thereon by defendants.

11. That it does not appear from the testimony submitted that the occupation of said premises by defendants since the 10th day of March, 1914, is, and was lawful. * * * *

1. That plaintiffs are not entitled to recover in this action.

2. That plaintiffs' action should be dismissed.

3. That defendants are entitled to judgment against plaintiffs, dismissing plaintiffs, action with costs. (Rec. pp. 17-18.)

VI.

In sustaining the Superior Court in its Conclusions of Law, as follows:

1. That plaintiffs were the occupants of the said above described premises at the time they were entered upon by the defendants herein, as above set forth, and that defendants unlawfully entered thereon and were and are guilty of forcible detainer against the plaintiffs, and plaintiffs were entitled to possession at the time of such forcible detainer.

2. That plaintiffs are entitled to the immediate possession of said premises above described, and to judgment against defendants for such immediate possession and for restitution thereof, and for the immediate issuance out of this court of a writ of restitution commanding the Sheriff of this county to forthwith restore the said possession to plaintiffs and to oust the defendants from said premises.

3. That plaintiffs are entitled to recover against defendants and to judgment therefor, double damages in the sum of $1,425.50, and interest thereon from date of judgment, together with plaintiffs' costs and disbursements herein to be taxed in the sum of $_____ and to execution therefor.

VII.

In not finding and deciding that the enforcement of the forcible entry and detainer laws of the State of Washington (Chap. 2, Rem. & Bal. Codes), in favor of defendants in error, would deprive plaintiffs in error of a substantial right guaranteed to them under the Homestead laws of the United States, and therefore that said laws of the State of Washington could not be enforced against plaintiffs in error.

VIII.

In holding that an act of the Legislature of the State of Washington supersedes and is paramount to an act of Congress.

IX.

In not directing the trial court to dismiss the action for want of jurisdiction.

X.

In sustaining the judgment as made and entered by the Superior Court.

ARGUMENT.

The question here presented is whether or not in the administration of the laws in a State court, an Act of the State Legislature shall be considered paramount to an Act of Congress, or, put in another form, will an Act of a State Legislature be enforced, when, by its enforcement a litigant will be deprived of a substantial right guaranteed him under an Act of Congress, or, going still further, will the legislative Act only be considered and the Congressional Act be swept aside as unworthy of consideration? Here we have a case in which defendants in error are seeking the enforcement of a State statute, basing their whole right to the possession of lands involved thereon, while plaintiffs in error come into court and show, or attempt to show, that every right which they claim is a right guaranteed them under an Act of Congress; basing their whole right to the lands in question and the right to the possession thereof, thereon. And under the rulings and decisions of the court the State statute is given full consideration and its

provisions enforced to the letter in favor of defendants in error, while the Acts of Congress and the right claimed by plaintiffs in error thereunder are not even deemed worthy of consideration; their affirmative defenses in which the rights claimed by them under the Federal laws are fully set forth, are stricken as sham, frivolous and irrelevant, and evidence offered, which, if accepted and proven, would give to plaintiffs in error the right to the possession and occupation of the lands in question under an Act of Congress, is rejected.

That an Act of Congress supersedes and is paramount to an Act of a State Legislature, cannot of course be questioned. In this country there are four kinds of laws which the courts cannot overlook and by which they are governed in the administration of justice, as follows: (1) The Federal Constitution, (2) Federal Statutes, (3) State Constitution, and (4) the State Statute.

The Federal Constitution not only grants certain powers to Congress, but recognizes certain powers in the States, but as the nation takes precedence of the States, this Constitution, which is the supreme law of the land, and the laws enacted by Congress under it, are preferred to all State Constitutions and statutes, and if any conflict arises between them, the latter must give way. When it is shown that an Act of a State Legislature infringes either the Federal Con-

stitution or a Federal Statute, or takes away a right granted to a litigant either under such Constitution or Statute, such legislative Act cannot prevail or be enforced. We deem it unnecessary to cite authorities upon this question.

That Congress under Section 3, Article IV of the Constitution of the United States has the sole power to dispose of the public lands of the United States, must be conceded, and neither a State Legislature nor a State court can in any manner interfere with the power so placed in the hands of Congress under the Constitution; consequently when Congress, by the enactment of the Federal Homestead laws, granted to a citizen of the United States, over the age of twenty-one years, or the head of a family, who had not previously made a homestead entry of public lands and was not the proprietor of more than 160 acres of land in any state or territory, the right to settle upon, cultivate and reside upon surveyed or unsurveyed lands of the United States, and by so doing acquire title thereto from the Government, it granted a right that when once exercised by a person having the requisite qualifications, must be protected by the courts; and also a right which cannot, by any Act of a State Legislature, be in any manner interfered with, abrogated or restricted. Therefore, it must follow as a matter of course, that when an Act of a State Legislature will, by the enforcement of its provisions, interfere with or prevent the exercise or enjoyment

of the right thus granted by Congress under the Federal Constitution, the State legislative Act must give way and the Act of Congress be upheld. When, therefore, plaintiffs in error by their affirmative defenses set forth their qualifications as a homestead settler under the Federal Homestead laws, and that the lands in question were unsurveyed public lands of the United States, agricultural in character, subject to their settlement under said laws and that their settlement and residence thereon and occupation thereof were made in good faith under said laws for the purpose of acquiring title thereto from the Government thereunder, they alleged that they were asserting a right granted them under an Act of Congress, under which they not only had the right to go upon said lands and in good faith make settlement and establish their residence thereon, but thereafter they had the further right, under said Act of Congress, to remain there and to the possession of the land to the exclusion of defendants in error, who, according to the allegations of the complaint and the affirmative defenses set forth in the Answer of the plaintiffs in error were trespassers upon the public domain of the United States. In other words, plaintiffs in error by the allegations of their affirmative defenses and offers of proof set forth, under an Act of Congress a perfect defense to defendants in error's cause of action, and a defense which would prevent defendants in error from a recovery under their com-

plaint and deprive the State courts of jurisdiction to enforce the law under which the action is brought. *And then and there the case should have been dismissed. It being shown that the court did not have jurisdiction to enforce the provisions of the State Statute under which defendants in error were seeking to recover.* It must be borne in mind that not only do said affirmative defenses set forth that the lands in question are unsurveyed public lands subject to settlement under the Federal Homestead laws, and the qualifications of plaintiffs in error as homestead settlers, and their settlement and residence upon said lands, but it is also alleged that defendants in error had never made settlement thereon or attempted to use, occupy or improve same, or claim any right thereto under the Federal Homestead laws, or under any law of the United States, and further that they are attempting to prevent plaintiffs in error from maintaining their residence thereon and acquiring title to the lands in order that defendants in error may wrongfully and unlawfully crop and cultivate the lands for profit. Section 2289, U. S. Rev. Stat., as amended by the Act of March 3, 1891, 26 Stat. 1095, provides that:

> "Every person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, shall be entitled to enter one-quarter section, or a

> less quantity of unappropriated public lands, to be located in a body in conformity to the legal sub-divisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any state or territory shall acquire any right under the homestead law. * * * "

Under this provision every person possessing the requisite qualifications is granted the right to enter one-quarter section of the public domain, and under Section 2291, such entryman is required to reside upon the lands so entered for a period of five years, and when so resided upon and cultivated, upon making proper proof thereof, is entitled to a patent from the Government conveying title to the land so entered, cultivated and resided upon. Said Section 2291 is as follows:

> "No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee, or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear

> true allegiance to the Government of the United States; then, in such case, he, she or they if at the time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

We next find that under Section 3 of the Act of May 14, 1880 (21 Stat. L. 140), these provisions are extended to *unsurveyed* as well as surveyed public lands. Said section reads as follows:

> "That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or *unsurveyed*, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

Under the pre-emption law, as it existed at the passage of said Act, a settler upon *unsurveyed* lands was allowed ninety days in which to make his filing, after the plats of survey were filed in the local land office and the lands opened for entry. (Sec. 2266, U. S. Rev. Stat.)

We therefore find that Congress, under the power conferred by the Constitution, in the disposition of the public domain, has granted the right to any person possessing the necessary qualifications to settle

upon, occupy, improve and reside upon public lands, *unsurveyed* as well as surveyed, and by and through such settlement, residence and cultivation acquire title thereto from the Government. And that right, being granted by Congress, which under the Federal Constitution has the sole and exclusive control of the public lands, it is not within the power of any State Legislature to pass a law which will in any manner infringe upon that right. We do not want to be understood, however, as contending that the forcible entry and forcible detainer laws, as they now stand upon the statutes of the State of Washington, are unconstitutional and void as a whole. But what we do contend for, is that they cannot be made to apply to public lands of the United States, and by the strict enforcement of their provisions a good faith settler upon such lands ousted therefrom and thereby deprived of a substantial right granted to him by an Act of Congress under the Constitution of the United States; and when a court finds that by the enforcement of their provisions such a result will follow, the provisions of the Federal Statutes must be declared paramount to the State Statutes, the Federal Statute upheld and the rights granted thereunder, to the settler protected, *and the case dismissed. The settler cannot be required to either furnish a bond as required by the State Statutes or abandon the right of possession guaranteed to him under a Federal Statute.*

Again, the pleadings, as they stand before the court, show that defendants in error in withholding the lands in question from plaintiffs in error are violating Sections 1 and 3 of the Act of February 25th, 1885 (23 Stat. L., 321, 322).

Section 1 provides as follows:

> "That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the *maintenance*, erection, construction, or control of any such *inclosure* is hereby forbidded and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful and hereby prohibited."

And Section 3, so far as it relates to the matter in question, provides:

> "That no person * * * * by any fencing or enclosing * * * * shall prevent or obstruct * * * * any person from peaceably

entering upon or establishing a settlement, or residence on any tract of public land subject to settlement or entry under the public land laws of the United States."

In their complaint, defendants in error allege that they are in the possession of, and have enclosed the lands in question, while plaintiffs in error allege that said lands are public lands of the United States and that defendants in error are not claiming same under the Federal Homestead laws, or under any law of the United States, and that, with the intent and purpose of wrongfully and unlawfully cultivating said lands they are preventing defendants in error from making and maintaining their settlement and residence thereon.

In the case of *Mondou vs. New York, N. H. & H. R. Co.*, 223 U. S. 1 (56 L. Ed. 327), 38 L. R. A. (N. S.) 44, cited by Justice Van Devanter in his opinion in the case of Gauthier vs. Morrison, to which we will hereafter further refer, in speaking upon the question here under discussion, the court says:

"The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat., 316, 4 L. Ed. 579:

'If any one proposition could command the universal assent of mankind, we might expect it

would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislature, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The Government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding."

'This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.' "

In the case of *Gauthier vs. Morrison* (232 U. S. 452), heretofore referred to, Justice Van Devanter in considering the rights of a homestead settler upon public lands says:

"The homestead law in terms subjects unsur-

veyed public lands, if agricultural and unappropriated to settlement by persons having the requisite qualifications and intending to comply with its requirements, as a means of acquiring the title, and also *plainly confers upon the settler the right of possession, without which compliance with those requirements would be impossible.* Rev. Stat., Secs. 2289, *et seq.*; U. S. Comp. Stat. 1901, p. 1388; Act May 14, 1880, 21 Stat. at L. 140, Chap. 89, Sec. 3; U. S. Comp. Stat. 1901, p. 1392; Rev. Stat. Sec. 2266; Act March 3, 1891, 26 Stat. at L. 1095, Chap. 561, Sec. 5, U. S. Comp. Stat. 1901, p. 1535; United States v. Waddell, 112 U. S. 76, 80, 26 L. Ed. 674, 5, Sup. Ct. Rep. 35; Sturr v. Beck, 133 U. S. 541, 547, 33 L. Ed. 761, 764, 10 Sup. Ct. Rep. 350; Nelson v. Northern P. R. Co., 188 U. S. 108, 125, 47 L. Ed. 406, 413, 23 Sup. Ct. Rep. 302; Scott v. Lattig, 277 U. S. 229, 240, 57 L. Ed. 490, 495, 44 L. R. A. (N. S.) 107, 33 Sup. Ct. Rep. 242; Wadkins v. Producers' Oil Co., 227 U. S. 368, 373, 57 L. Ed. 551, 555, 33 Sup. Ct. Rep. 380. So it clearly appears from the allegations of the complaint, as admitted by the demurrer, that the land in question was open to homestead settlement when the plaintiff settled thereon; *that by his settlement and subsequent acts he acquired an inceptive homestead right which entitled him to the possession; and that the defendants, in forcing him to withdraw from the land, and in then withholding* the same from him, wrongfully invaded his possessory right." (Italics ours.)

When the lands sought to be acquired are unsurveyed the only way in which a homestead settler can initiate his claim and acquire a preference right to the lands which he seeks is by *making a settlement and*

establishing his residence thereon, and by such settlement and residence he acquires a valuable and valid vested right under the Homestead laws of the United States, which were enacted for the benefit of the actual settler.

Moss vs. Dowman, 176 U. S. 413 (44 L. Ed. 526).
Shepley vs. Cowan, 91 U. S. 330 (23 L. Ed. 424).
Anderson vs. Carkins, 135 U. S. 483 (43 L. Ed. 272).
Bohall vs. Dilla, 114 U. S. 47 (29 L. Ed. 661).

In the case of Moss vs. Dowman, *supra*, Justice Brewer, in rendering the opinion of the court, says:

> "Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that and they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that unless the statutes made such a result necessary from a true construction of their language it ought to be rejected. *Again and again has this court affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws of the United States.*" (Italics ours.)

In the case of *United States vs. Waddell et al.*, 112 U. S. 76 (28 Law Ed. 673), also cited by Justice Van Devanter in the Gauthier case, *supra*, Justice Miller, in delivering the opinion of the court, speaking upon the right of a settler upon public lands under the homestead law, says:

> "The right assailed, obstructed, and its exercise prevented or intended to be prevented as set out in this petition, *is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an Act of Congress. The Constitution of the United States, by Article IV, Section 3, in express terms vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. One of its regulations, the one under consideration, authorized a class of persons, of whom Lindsey is one, to settle upon its land*, and on payment of an inconsiderable sum of money and the written declaration of intention to make it a homestead, he is authorized to reside there. *By building a house and making other improvements on it and residing there for five years consecutively which, under the statute and under that alone, he has a right to do*, and paying the fees to the officer necessary to its issue, he acquires a patent or title in fee simple to the land. *But his title is dependent on continued residence of himself or family.* By the original entry he acquires the inchoate but well-defined right to the land and its possession, which can only be perfected by continued residence, possession and cultivation for five years. *His right to continue this residence*

for five years, for that purpose is dependent upon the Act of Congress. His right to the patent, after this is done, rests exclusively on the same foundation. The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the state and by its courts. But it is something different from that. *It is the right to remain on the land in order to perform the requirements of the Act of Congress* and, according to its rules, perfect his incipient title. Whenever the acts complained of are of a character to prevent this or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress, a person because he has exercised it, then, because it is a right asserted under the laws of the United States, and granted by the laws, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute." (Italics ours.)

Since the Act of February 25th, 1885, a valid settlement may be made upon public lands unlawfully enclosed; even though the settlement is effected by breaking and entering the enclosure.

Jones vs. Kirby, 13 L. D. 702.
Thompson vs. Holyroyd, 39 L. D. 362.
Stovall vs. Heenan, 12 L. D. 382.
Wheeler vs. Rodgers, 28 L. D. 250.
Norton vs. Westbrook, 9 L. D. 455.
Stoddard vs. Neigle, 7 L. D. 340.

In the case of Stovall vs. Heenan, *supra*, it is said:

"The preponderance of the evidence shows that

Stovall fenced this land and built the cabin on it, not under any permit from the railroad company or with intention of buying it of the company, but solely to prevent it being settled upon and entered by other persons, until such time as he could take it. His acts were in violation of the law (Act of February 25, 1885, 23 Stats. 321), and in disregard of the President's proclamation of August 7, 1885. In this proclamation the President refers to the act above cited and says inter alia, 'I * * * * * do hereby order and direct that any and every unlawful inclosure of the public lands maintained by any person, association or corporation, be immediately removed, and I do hereby forbid any person, association or corporation from preventing or obstructing by means of such inclosure * * * * any person entitled thereto from peaceably entering upon and establishing a settlement or residence on any part of such public land which is subject to entry and settlement under the laws of the United States, etc.' Stovall was a wrongdoer and acquired no right by his fencing, breaking or cultivation. Heenan went upon the land without any violence,—he made a settlement, built a house and established his residence, within an enclosure erected in violation of law. In the case of Horton v. Westbrook (9 L. D. 455), the case of Stoddard v. Neigle (7 L. D. 340) was followed, and it was said,—"*A settlement made without violence within the unlawful and unauthorized enclosure of another, is valid and will not be defeated by such unlawful occupancy.*" (Italics ours.)

There is no contention on the part of defendants in error that plaintiffs in error resorted to violence in making their settlement and establishing their resi-

dence upon the lands in question.

In the case of Jones vs. Kirby, *supra*, it appears that the land in question was unsurveyed and had been enclosed by Kirby with a wire fence, the enclosure containing 150 to 200 acres. In making his settlement, Jones cut this wire fence, and it was contended by Kirby that the settlement of Jones having been effected by breaking through his enclosure was in violation of law and that he gained no rights thereby.

In passing upon this question, First Assistant Secretary of the Interior Chandler says:

> "This Department has held that a settlement established by breaking an enclosure will not eb upheld, but in all such cases the force was employed against one who was claiming the land by virtue of a right of entry or settlement, under some one of the land laws. I know of no instance where a bona fide settler has been denied his settlement rights because he entered an unlawful enclosure for the purpose of asserting them, where such enclosure is prohibited by statute and its destruction allowed by circular of this Department. See Stovall v. Heenan, 12 L. D. 382."

In the case of *The Hastings and Dak. R. Co. vs. Whitney*, 132 U. S. 366 (33 L. Ed. 363), Justice Lamar, in delivering the opinion of the court, after citing several decisions of the Land Department, says:

> "It is true that the decisions of the Land De-

partment on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In United States v. Moore, 95 U. S. 760, 763 (24:588, 589), this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. * * * * The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret. See also Brown vs. United States, 113 U. S. 568, 571 (28:1079, 1080), and cases cited; United States vs. Burlington & M. R. R. Co., 98 U. S. 334-341 (25: 198, 200); Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 418 (28:794, 796).'"

In the case of *Bogan vs. Edinburgh, Am. Land Mtg. Co.*, 27 U. S. Appeals, 346, Judge Sanborn, in delivering the opinion for the Circuit Court of Appeals, after citing a long list of decisions from the Land Department upon the question at issue, said:

> "In the reports of these cases will be found opinions by Secretaries Delano, Teller, Vilas, Lamar and Noble in support of this view of the law, and no opinions of any of the Secretaries to the contrary have been called to our attention. The opinions of these eminent lawyers, one of whom subsequently became one of the Justices of the Supreme Court, are very persuasive."

We call attention to the decisions of the Land Department for the purpose of showing that by the

allegations of the affirmative defenses as set forth by plaintiffs in error, they set forth a right which would be recognized and upheld by said Department; which under the laws of Congress is charged with the duty of executing the laws relating to the public lands of the United States. And we call attention to the decisions of the United States Courts for the purpose of showing that in matters pertaining to the construction of public land laws the highest courts of the land recognize and give weight to the interpretation of those laws as laid down by that Department.

If the lands in question were unsurveyed, public lands, as alleged by plaintiffs in error in their affirmative defenses, and were enclosed and occupied by defendants in error not as settlers or claimants under any law of the United States, but as trespassers upon the public domain in violation of the Act of February 25, 1885, *supra*, as also alleged, then in that event plaintiffs in error had the right to go thereon and make settlement and establish their residence under the laws of Congress, and such settlement and residence, and all rights thereby acquired by plaintiffs in error would be upheld by the Land Department.

The lands in question being unsurveyed, no entry, or record could be made by or on behalf of plaintiffs in error in the land office or land department by

which they could acquire any right to the lands or any preference therein, and the only way that they could acquire any rights therein under the Federal Homestead laws would be by going thereon in person and making settlement and establishing their residence upon the lands; and in order to protect the rights thus acquired they must, under the laws, continue that residence and make the lands their home and place of residence.

Gauthier vs. Morrison et al., supra.

There is no law under which a would-be settler can bring an action in court, or in the Land Department, to oust an unlawful occupant of public lands and thereby gain a preference right to the lands upon which he desires to make settlement and establish his residence.

We maintain that in a forcible entry or forcible detainer case, whenever it is alleged by defendant that the land in question has never been surveyed, and it further appears that the defendant is claiming his right to the possession thereof as a qualified homestead settler thereon, in good faith, under the Homestead laws of the United States, that then and there such defendant has shown that the plaintiff cannot maintain forcible entry or forcible detainer, *and there the case must end.* This must be so, for the reason that when the land is shown to be unsurveyed, it is shown that the title is in the United States and

under the control of Congress, and when the defendant has shown that he has shown that he is asserting a right guaranteed to him by Congress, which alone has the power, under the Constitution, to grant any right to the occupation, or to the possession thereof. If Congress has the exclusive control of such lands, and that must be admitted, surely a court cannot, by the enforcement of a State Statute, deprive a person of a right granted and guaranteed to him by an Act of Congress. Neither can the question of the right of possession under such conditions be determined, either in a forcible entry, or a forcible detainer action.

Under the laws of this State we have forcible entry (Sec. 810, R. & B. Ann. Codes), forcible detainer (Sec. 811), and unlawful detainer (Sec. 812), and thereunder provisions are made for separate and distinct causes of action, which may be brought by a plaintiff according to the facts which he expects to prove. As no force, menace or violence is alleged by defendants in error to have been exercised by plaintiffs in error, as provided for under subdivision 1 of Section 811, this action is for forcible detainer under subdivision 2 of said section, which provides as follows:

> "Every person is guilty of forcible detainer who either,—
>
> 2. Who in the night-time, or during the absence of the occupant of any real property un-

lawfully enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

This is the provision of the statute under which the complaint is drawn, and under which the entry must not only be made in the night-time or in the absence of the occupant for five days next preceding such entry, but the entry must be made *unlawfully*. And our contention is that an entry upon land cannot be held to be unlawful when the person so making the entry complained of is attempting that which an Act of Congress plainly says he may do, and by such entry he is asserting a right granted and guaranteed to him under a Federal Statute. Consequently if the lands in question are unsurveyed public lands of the United States, as alleged in the affirmative defenses of plaintiffs in error, and they are qualified to make settlement and establish their residence thereon, and did so as homestead settlers under the Homestead laws of the United States, as they also allege, such defense was competent, for the purpose of showing that instead of their entry upon the lands being unlawfully made it was lawful under the provisions of a Federal Statute which gave them the right to go thereon in the manner they did, if they so desired.

In the case of *Hebeisen vs. Hatchell*, 69 Pac. 888, it appears that plaintiff brought an action of unlawful detainer against defendant and was successful before the trial court. Upon appeal to the Supreme Court it was found that the action was brought to recover possession of lands, the title to which, at the time of the commencement of the action, was in the United States and a contest pending before the Land Department between the parties, although the contest was finally decided in favor of plaintiff before the trial of the case. *Upon these facts the judgment of the trial court was reversed and the trial court directed to dismiss the action for want of jurisdiction.*

In the case of *Commager vs. Dicks*, 28 Pac. 864, an action was commenced in forcible entry and detainer and judgment for plaintiff was rendered in the trial court. Upon appeal this judgment was reversed, and in rendering the opinion the court says:

> "It appearing that the defendant's entry upon said land was lawful and peaceable, and with the bona fide intention of making a homestead thereon, and it further appearing that at the time this action was commenced the claims of the parties thereto to said premises were being waged in the land department, *the court should not have entertained jurisdiction, but should have dismissed said cause at the cost of the plaintiff.* The judgment of the district court is reversed, with costs, and the cause is remanded, with direction to dismiss said action at the cost of the plaintiff." (Italics ours.)

In the case of *Streeter vs. Rolph*, 14 N. W. 166, it was held that, as it appeared that the title to the land in question was still in the government, *an action of forcible entry would not lie.*

In the instant case, plaintiffs in error are not attempting to put the title in issue. All they are claiming is that the lands in question have never been disposed of by the United States; that said lands are agricultural in character, and that they are in the possession thereof, under an Act of Congress, which grants to them the right to enter thereon and to the possession thereof, and that no court can under a State Statute deprive them of that right. And we again assert that when it is shown that the lands have never been surveyed and title passed from the Government by, through or under an Act of Congress, and that plaintiffs in error, having the necessary qualifications, are settlers thereon under the Federal Homestead laws, the action should be dismissed as an action in forcible detainer will not lie.

If the decision of the State Supreme Court in the instant case is sustained, as a result trespassers upon the public domain can, by the enclosure thereof, prevent any good faith settler from making a settlement and maintaining a residence thereon and acquiring title thereto from the Government, under the settlement laws of the United States, and thus an unlawful act will be sustained by courts of justice, and the doing of a lawful act prevented.

In this case not only did the court strike the affirmative defenses set forth by plaintiffs in error in their answer showing that in going upon the lands in question they were exercising a right granted to them by an Act of Congress, and at the trial of the case refused to allow them to introduce any evidence showing that the lands in question were unsurveyed lands that had never been alienated by the Government of the United States, but tried the case upon the one question of whether defendants in error had been in the peaceable and undisturbed possession of the lands for a period of five days prior to the entry thereon by plaintiffs in error. The court can readily see that if an action in forcible entry, or forcible detainer, can here be maintained, a trespasser upon the public domain can, through such actions, prevent a good faith settler from initiating a right thereto under the public land laws, and can also prevent such settler from occupying and residing thereon and acquiring title thereto. In other words, a trespasser upon public lands can through the enforcement of a State Statute nullify and make inoperative an Act of Congress based upon the Constitution of the United States.

Respectfully submitted,

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SUBJECT INDEX

	Pages
Statement of case	2
Forcible entry and detainer statute of Washington	3-4
Neither title nor right of possession can be tried under forcible entry and detainer statute	3-7
Many states have held rule with regard to title and right of possession to be the same where land is owned by United States	6-7
The state legislatures and courts have jurisdiction over the public land for the exercise of police power	7-12
If any right had by plaintiffs in error has been impaired, such impairment is by the valid exercise of the state's police power and plaintiffs in error are without remedy	11-12
The forcible entry and detainer statute is not in conflict with the act of congress and does not infringe upon the federal authority	13-14
If the state statute does infringe upon the federal authority the infringement is so unsubstantial and slight as to be negligible	14-15
The state law does not deprive plaintiffs in error of any right nor does it impair any right	15-25

Plaintiffs in error have confused their right with their remedy 17-19

Plaintiffs in error have a full remedy under other state statutes, though none under the forcible entry and detainer statute 18-19

A break in the continuity of the residence on the land does not lose or impair the right of the plaintiffs in error 19-23

The state may legislate as it pleases as to the remedies to be prosecuted in its courts 24-25

The act of congress of February 25, 1885, (23 Stat. L., 321) is a criminal statute without bearing in this civil action except as furnishing plaintiffs in error an additional remedy 26-27

The construction of the state statute is within the exclusive jurisdiction of the state court 27-28

Plaintiffs in error went upon the land unlawfully if against the will of the occupant 28-29

The words in the forcible entry and detainer statute "entitled to possession" construed —right of possession is not put in issue by it 29-32

LIST OF CASES REFERRED TO.

Pages

Atl. Coast Line R. Co. v. Goldsborough, 232 U. S. 548 12

Atherton v. Fowler, 96 U. S. 513 ..... 10, 16

Bacon v. Walker, 204 U. S. 311 10

Barbier v. Connolly, 113 U. S. 27 ..... 14, 25

Barrett v. Palmer, 135 N. Y. 340; 17 L. R. A. 720 10

Biddle v. Boggs Merced M. Co., 14 Cal. 279, 375-376 10

Brown v. Walling, 204 U. S. 320 10

Cannon v. Johanson, 34 L. D. 348 20

Carteri v. Roberts, (Cal.) 73 Pac. 818 29

Chezum v. Campbell, 42 Wash. 560 4

Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542 8

Chicago A. R. Ry. Co. v. Trambarger, 238 U. S. 67 12

Cunningham v. Green, 3 Ala. 127 6

Dutcher v. Sanders, (Cal.) 129 Pac. 809 ..... 6, 29

Escanaba & L. M. Trans. Co. v. Chicago, 107 U. S. 678 12

Fisher v. Boyer, 19 L. D. 178 20

Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525 8

Gauthier v. Morrison, 232 U. S. 452 ..... 9, 21

Gore v. Altice, 33 Wash. 335 4

Hadacheck v. Sebastian, 239 U. S. 394 ..... 12, 25

Hammond v. Doty, 56 N. E. 371 7

Ia. Central R. Co. v. State of Ia., 160 U. S. 389 24

Iron Mountain etc. R. R. Co. v. Johnson, 119 U. S. 608 5

Jenkins v. Trynon, 27 Pac. 893 7

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285 15

Mayor etc. v. Miln, 11 Peters 102, 139-143.....14
Mears v. Dexter, 11 S. E. 538..... 6
Meyer v. Beyer, 43 Wash. 368..... 4
Mitchell v. Davis, 23 Cal. 381.....30
Miss., K. & T. R. Co. v. Haber, 169 U. S. 613.....17
Morley v. Lake Shore & Mich. So. R. Co., 146 U. S. 162 28
Morris v. Healey Lmbr. Co., 33 Wash. 451.....25
Morrison v. Gunning, 91 Wash. 693..... 7
Montana Co. v. St. L. M. & M. Co., 152 U. S. 160 25
Olinger v. Shepard, 12 Gratt. (Va.) 462..... 7
Patrick v. Manning, 7 L. D. 144.....20
People v. Shearer, 30 Cal. 645-658.....10
Pettyjohn v. Akers, 6 Yerger (Tenn.) 448..... 6
Phoenix Ins. Co. v. Gardner, 11 Wall. 204....18, 28
Pollard et al., Lessee, v. Hagan, 3 How. 212....8, 10
Reedhead v. Hauenstine, 15 L. D. 554.....20
Ridpath v. Denee, 85 Wash. 322..... 7
Rock Island & P. Ry. Co. v. McGlinn, 114 U. S. 542 10
State ex rel Loan Society v. Prather, 19 Wash. 336 25
Sweet v. Ballantine, (Ida.) 69 Pac. 995.....11
Sifers v. Johnson, (Ida.) 65 Pac. 709.....11
Smith v. Place, 13 L. D. 214.....20
2 Story on Constitution, Sec. 1385 (5th Ed.).....24
Voll v. Hollis, 60 Calif. 569.....29
Watts v. U. S., 1 Wash. Terr. 288-289.....11
Watts v. Wash. Terr., 1 Wash. 409 11
Ward v. Race Horse, 163 U. S. 504.....10
Wilcox v. Jackson, 13 Peters 498.....24
Wintermute v. Carner, 8 Wash. 585.....24
Woodruff v. North Bloomfield G. M. Co., 18 Fed. 753, 772 10

IN THE

SUPREME COURT

OF THE

United States

October Term, 1917

No. 440.

H. J. GUNNING and ELLEN E. GUNNING, his wife,

Plaintiffs in Error,

vs.

PETER MORRISON and AGNES MORRISON, his wife,

Defendants in Error.

Error to the Supreme Court of the State of Washington.

BRIEF FOR DEFENDANTS IN ERROR

REESE H. VOORHEES,
H. W. CANFIELD,
Counsel for Defendants in Error,
Spokane, Wash.

SHAW & BORDEN CO. 178311

STATEMENT.

The defendants in error had been in the peaceable and undisputed possession of the land involved in this action for a number of years, and had it improved, fenced and under high cultivation, and it was in this condition at the time that the plaintiff in error, in the night time and in the absence of the defendants in error and without their permission and against their will, broke into and entered upon it. (Find. of Fact, Trans., pp. 19-22).

Thereafter, after proper notice given as required by the state statute, the plaintiff in error refused to remove from said land. (Ib. p. 20). This action was brought and the defendants in error recovered judgment for possession and damages under the forcible entry and detainer statute of the state of Washington. (Ib. pp. 1, 10, 22).

It is charged on behalf of the plaintiffs in error that the forcible entry and detainer statute of the state of Washington is, because of the peculiar facts alleged in this case, in conflict with a federal statute and the Constitution of the United States. The point relied on by plaintiffs in error, as controlling, is the allegation made in the way of an affirmative defense in their answer, to-wit, that the title to the lands is in the United States, and

that plaintiffs in error went as locators on the same for the purpose of acquiring the lands under the homestead laws. (Trans., pp. 3-8). This affirmative defense was struck out by the trial court (the ruling being sustained by the Supreme Court of the state), on the ground that neither the title nor the right of possession can be adjudicated in an action brought under the forcible entry and detainer statute of the state of Washington.

ARGUMENT.

Neither Title Nor Right of Possession Can Be Tried in This Action.

The part of the state statute upon which the courts below based their ruling is as follows: (R. & B. Anno. Codes & Statutes of Washington):

> "Sec. 811. Every person is guilty of a forcible detainer who either,—
>
> 1. By force, or menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or
>
> 2. Who in the night-time, or during the absence of the occupant of any real property [unlawfully] enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning

of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

"Sec. 825. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

The supreme court of Washington has consistently held that, under this statute, neither title nor right of possession can be shown, and that the statute invades no constitutional right, and this interpretation is endorsed generally throughout the states.

Gore v. Altice, 33 Wash., 335;
Chezum v. Campbell, 42 Wash., 560;
Meyer v. Beyer, 43 Wash., 368.

This court has also sustained these statutes and this interpretation, saying:

"The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by violence, or by terror. The party so using force and acquiring possession may have the superior title or may have the better right to the present possession, but the policy of the

law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in statu quo, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to have relation to the condition of the title or to the absolute right of possession, but to compelling the party out of possession, who desires to recover it of any person in the peaceable possession, to respect and resort to the law alone to obtain what he claims."

Iron Mountain, etc., R. R. Co. v. Johnson,
119 U. S., 608.

It was urged, however, that, because the plaintiffs in error could show, as they have alleged, that the land belongs to the United States and is open to homestead settlement and that plaintiffs in error were acquiring the land under the homestead laws, the fact that the United States is the owner, if proven, makes the forcible entry and detainer statute of the state, which the plaintiffs in error admit generally to be constitutional, in this particular instance unconstitutional, and that they should have been permitted to show the title and

right of possession. The plaintiffs in error base this contention upon the propositions:

(a) That Congress has the sole and exclusive control of the public lands, and

(b) That Congress, by the homestead laws, has vested in the plaintiffs in error a right to settle upon and acquire the lands, and

(c) That the plaintiffs in error are being deprived of this right, because the forcible entry and detainer statute does not permit them to show the title in the United States and their consequent right of possession.

It has been repeatedly ruled in various states that the fact that the land is public land, owned by the United States, does not render the forcible entry and detainer statutes unconstitutional, and that it is not material, in actions brought under such statutes, that the title is in the United States —that nevertheless such title and consequent right of possession cannot be shown; that such statutes are a legitimate exercise by the state of its police power, and that it is as easy to break the peace by resort to violence, and the consequences are as pernicious, where the title is in the United States as where it is in a private party.

Dutcher v. Sanders, (Cal.), 129 Pac., 809;
Cunningham v. Green, 3 Ala., 127;
Pettyjohn v. Akers, 6 Yerger (Tenn.), 448;
Mears v. Dexter, 11 S. E., 538;

Olinger v. Shepard, 12 Gratt., (Va.), 462;
Hammond v. Doty, (Ill.), 56 N. E., 371;
Jenkins v. Trynon, (Colo.), 27 Pac., 893;
Ridpath v. Denee, 85 Wash., 322;
Morrison v. Gunning, 91 Wash., 693.

The position taken by the plaintiffs in error, however, is that these decisions are wrong and that where the land is government land, the operation of the forcible entry and detainer statute is unconstitutional, notwithstanding the many decisions to the contrary. We shall, therefore, consider the question as though it had not been specifically ruled upon.

The State Legislatures and Courts Have Jurisdiction Over the Public Land for the Exercise of Police Power.

It is true that Congress, under Sec. 3, Art. 4 of the Constitution of the United States, has the exclusive power of disposition over the public lands, but it is not true, it is submitted, that Congress has exclusive jurisdiction for all purposes over such lands. Sec. 8, Cl. 17 of Art. 1 of the United States Constitution, as against the states, reserves to the United States the right "To exercise *exclusive legislation* in all cases whatsoever * * * over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings." With regard to

other property within the state, however, the Constitution does not reserve to Congress the *exclusive* power of legislation and consequent exclusive jurisdiction, the constitutional provision in that regard being in sharp contrast with the one just quoted, to-wit:

> "That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (Art. 4, Sec. 3, Cl. 2).

By reason of these differences, we submit, the states can legislate, within limits, with regard to and entertain jurisdiction over the public lands lying within their borders, where such lands have not been ceded by the states to the United States for any of the purposes specified in Sec. 8 of Art. 1.

Pollard et al. v. Hagan, 3 How., 212;
Chicago, Rock Island & Pac. Ry. Co. v. Wm. McGlinn, 114 U. S., 542;
Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525.

Referring to places ceded by the state to the general government for arsenals and such purposes, in *Ft. Leavenworth R. R. Co. v. Lowe*, supra, the court said:

> "Such is the law with reference to all instrumentalities created by the general govern-

ment. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers, but when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits."

That the states have the power to legislate with regard to matters of internal government over the public lands of the United States and the state courts the power to enforce those laws on such lands, has been recently held by this court, and one of the reasons given why the states should exercise jurisdiction on public lands within their borders was the very ground on which rests the forcible entry and detainer statutes. The court quoted with approval the supreme court of Oklahoma, as follows:

"To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the Land Department, would be an announcement of a doctrine abhorent to a sense of common justice. It would encourage the strong to override the weak; would place a premium upon greed and the use of force, and in many instances lead to bloodshed and crime."

Gauthier v. Morrison, 232 U. S., 452.

Nor can it be successfully contended that the exercise of police power over such lands is in con-

flict with the spirit and object of the *homestead* laws, while it might be permissible over public lands so far as other acts of Congress are concerned. This court, with regard to the public land law, has said:

> "It did not propose to gives its bounty to settlements obtained by violence at the expense of others. * * * It would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less moral turpitude."
>
> *Atherton v. Fowler*, 96 U. S., 513.

It has been repeatedly ruled by this court and other courts that the police power of the state may be made to operate upon the lands owned by the United States within the state.

Bacon v. Walker, 204 U. S., 311;
Brown v. Walling, 204 U. S., 320;
Rock Island & Pac. Ry. Co. v. McGlinn, 114 U. S., 542;
Ward v. Race Horse, 163 U. S., 504;
Pollard's Lessee v. Hagan, 3 How., 223;
Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed., 753,772;
Biddle v. Boggs Merced M. Co., 14 Cal., 279; 375-376;
People v. Shearer, 30 Cal., 645-658;
Barrett v. Palmer, 135 N. Y., 340; 17 L. R. A., 720;

Watts v. United States, 1 Wash. Terr., 288-289;
Watts v. Wash. Terr., 1 Wash., 409;
Sifers v. Johnson (Ida.), 65 Pac., 709;
Sweet v. Ballantine (Ida.), 69 Pac., 995.

It can not be questioned that laws which are designed, as are the forcible entry and detainer statutes, for the preservation of the peace and to prevent men from resorting to violence to secure their supposed rights, are passed in the exercise of the police power of the state. No higher or more necessary exhibition of police power can be conceived, we submit, than that which prevents the people of the state from returning to the methods and practices of barbarism. It is a situation where the public safety is the supreme law, and if any right had by the plaintiffs in error has, in fact, been impaired, or otherwise interfered with, they are without remedy, as where one's house is destroyed to stop the spread of a general conflagration. The law is not arbitrary, or discriminatory, or unfair. This court has said:

> "But a more satisfactory answer to the argument under the contract clause and one which at the same time refutes the contention of the plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of the community at large, and for the purpose of preventing an unnecessary and widespread injury to property. It is established by repeated decisions of this

court that neither of these provisions of the federal constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise. *Atl. Coast Line R. Co. v. Goldsborough*, 232 U. S., 548, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity as well as those in the interest of the public health, morals or safety."

Chicago A. R. Ry. Co. v. Trambarger, 238 U. S. 67.

"It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. * * * And the only limitation upon the power was stated to be that the power cannot be exerted arbitrarily, or with unjust discrimination."

Hadacheck v. Sebastian, 239 U. S., 394;

Atl. Coast Line R. Co. v. Goldsborough, 232 U. S., 548;

Escanaba & L. M. Trans. Co. v. Chicago, 107 U. S., 678.

The Forcible Entry and Detainer Statute is Not in Conflict With the Act of Congress, and Does Not Infringe Upon the Federal Authority.

No right of the United States is infringed by the state statute. The forcible entry and detainer statute in no way changes the status of the land, does not affect it in any way, does not interfere with the United States in relation to it, and does not prevent the act of Congress disposing of it under the homestead laws. The state legislature does not attempt to vest any right in the land in any one.

The mere fact that the right claimed by plaintiffs in error is derived from an act of Congress does not, of itself, make the state law act against the United States, or otherwise than against the citizen. If the plaintiffs in error were the absolute owner of land by virtue of a patent from the United States resting for its validity on an act of Congress, the police power of the state could interrupt their enjoyment of the absolute right under the act of Congress and take them from the land. Clearly this action would be against the individual and not against the United States.

Again: If the plaintiffs in error, when they settled on the land, had increased the force and

violence to which they resorted, and, instead of committing a mere misdemeanor under the code (R. & B., Sec. 2558), had killed the then occupant, it would be impossible, we submit, for any one to contend that because the plaintiffs in error had the right to *continuous* occupancy of the land under an act of Congress, they could not be arrested by the state authorities, taken from the land, tried for the crime and sent for the balance of their natural lives to the penitentiary. Yet this would not only have interfered with but would have entirely destroyed their ability to enjoy the right they claim under the act of Congress. The state statute, we submit, acts upon the man or citizen, and not upon the land or act of Congress, and is clearly within the state's powers.

The Mayor, etc., v. Miln, 11 Peters, 102,139-143;
Barbier v. Connolly, 113 U. S., 27.

Even though, from some point of view, the state law might be considered to infringe upon the federal authority,—say, in that it prevented the United States from acquiring a prospective buyer, *in the night time*—such infringement is so unsubstantial, and so incident to the real laudable object intended and accomplished, that the interference, if any there is, must be deemed inocuous and negligible, and to fall under the principle of

the rule laid down by this court with regard to federal control of interstate commerce. The court said:

> "If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court upholding local regulations which in some degree or only incidentally affected commerce among the states, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the states and to be respected so long as Congress did not itself cover the subject by legislation. * * * 'Nor is it within the necessary meaning of the constitution a regulation of commerce, *although it controls, in some degree, the conduct of those engaged in such commerce.* So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits.' " (Italics ours).
>
> *Lake Shore & M. S. R. Co. v. Ohio,* 173 U. S., 285.

The State Law Does Not Deprive Plaintiffs in Error of Any Right, Nor is Any Right Impaired Thereby.

Plaintiffs in error could have entered on the land in the day time and while the occupant was present. It was not necessary for them to vio-

late this statute in order to settle on the land under the act of Congress, or in order to enjoy fully the right to acquire which the act of Congress grants. The act of Congress does not provide that its benefits can only be secured in the night time, or in the absence of a prior occupant.

It cannot be conceived, we submit, that Congress intended to direct, as a right in the plaintiffs in error, action which has been so generally denounced, by the legislatures in these statutes, and by the courts, as highly prejudicial to the public welfare. (*Atherton v. Fowler*, supra). Plaintiffs in error voluntarily turned their backs on a course of unquestianable legality and one fully sufficient to secure their right, and wilfully chose to violate the state law. All the hours of daylight being available to the plaintiffs in error, when the occupant was not absent, in which to go upon the land to initiate their settlement, it is obvious that, even though the hours of darkness were taken from them, the state statute neither deprived them of nor impaired their right. It is equally obvious, we submit, that the act of Congress and the state law can both operate without conflict and that the full results sought by each may be, at the same time, fully and efficiently attained. As said by this court:

> "May not these statutory provisions stand without obstructing or embarrassing the ex-

> ecution of the act of Congress? This question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."
>
> *Mis., K. & T. R. Co. v. Haber,* 169 U. S., 613.

But, we submit, there is still a further reason why the state law cannot be charged with having deprived plaintiffs in error of any right. The plaintiffs in error appear to have confused the *right* they claim with the *remedy* and to have reached the conclusion that, because the *forcible entry and detainer statute* of the state does not afford them a *remedy* by which to prevent their possession from being interfered with, they have been deprived of and have lost their *right*. But the *right* and the *remedy* are two distinct things, and the plaintiffs in error have been deprived of no *right*, notwithstanding that the state has given them no remedy by that particular statute. The thought here is clearly expressed by this court:

> "Had the state courts decided against the right of the plaintiffs, and had it so appeared by the record, the jurisdiction of this court would have attached to the case. But that does not appear. It only appears that they have decided that the plaintiff has no

> remedy under this statute. Its right to recover the illegal tax is undisputed, but not to recover it in this way."
>
> *Phoenix Ins. Co. vs. Gardner,* 11 Wall., 204.

It will be observed from a reading of the statute that forcible detainer does not exist until the person invading the possession of another has received a demand from such other to surrender the possession so secured, and for three days after such demand has refused to do so. The settler, therefore, notwithstanding the state statute, has some time on the land, whether he goes off within three days after demand or puts up a bond and awaits judgment, within which to initiate and secure an inchoate right to the land. In the case at bar plaintiffs in error were in actual possession from the 10th day of March, 1914, until after judgment, on February 18, 1915. (Findings 5, 9, Trans., p. 20). Whether the settler goes off in three days or is put off under the judgment,—in either event he has an inceptive right, and the state, by another statute, has given him a full remedy by which his alleged right to acquire the lands, and to regain possession is protected and preserved to him. Sections 942 and 785 et seq. of R. & B. Code of Washington, give the same remedy to the plaintiffs in error to recover the possession and protect the alleged right, that is had by every other citizen of the state, to-wit, ejectment or a suit in equity, if necessary. One who

was absolute owner of the land under a grant by act of Congress, would have to give up the possession under the forcible entry and detainer statute and recover it by the ejectment statute. Section 942 reads:

> "Sec. 942. Any person now occupying and settled upon, or who may hereafter occupy or settle upon, any of the unsurveyed public lands, not to exceed one hundred and sixty acres, in this state, for the purpose of holding and cultivating the same, may commence and maintain any action, in any court of competent jurisdiction, for interference with or injuries done to his or her possession of said lands, against any person or persons so interfering with or injuring such lands or possession; Provided always, that if any of the aforesaid class of settlers are absent from their claims continuously for a period of six months in any one year, the said person or persons shall be deemed to have forfeited all rights under this section."

It is true that plaintiffs in error lay much stress on the requirement of the homestead law that the residence of the settler shall be continuous, but the enforced break in the continuity of the presence of plaintiffs in error on the land does not cause a break in the continuity of their residence, nor prejudice the right of plaintiffs in error with the government. The rule in the Interior Department is as follows:

> "It is stated as one ground of the decision of your office that the claimant's 'residence'

> was not 'continuous,' doubtless meaning thereby, that his actual presence upon the land was not continuous. Residence on land and presence thereon are not synonymous or convertible phrases. Actual presence on the land is necessary in the first instance in order to acquire residence as the entrymen must go on the land for that purpose; but continuous presence thereafter is not essential to the continuity of such residence once acquired. Residence having been established, subsequent absence *animo revertendi* and for a purpose which the law recognizes as a sufficient excuse for such absence, does not indicate an intent to abandon, and without such intent, the legal continuity of the residence is not broken, as, in such cases, the act and intent must concur."
>
> *Patrick Manning* 7 L. D., 144;
> *Cannon v. Johanson*, 34 L. D., 348.

The presence of plaintiffs in error on the land was interrupted by a judicial order. (1 Rem. & Bal. Code, Secs. 819, 820, 827). If presence on the land is interrupted by judicial restraint the continuity of the residence is not broken.

> *Reedhead v. Hauenstine*, 15 L. D., 554;
> *Smith v. Place*, 13 L. D., 214;
> *Fisher v. Boyer*, 19 L. D., 178.

This court has held that the temporary break in their possession, occasioned by the exercise of the police power of the state, does not cause the plaintiffs in error to lose their right to perfect

the settlement once begun and to acquire the land, but that they have a full remedy in the state ejectment statute and can protect their right by that remedy.

Gauthier v. Morrison, 232 U. S., 452.

The case of *Gauthier v. Morrison,* supra, is relied upon by plaintiffs in error, but, we submit, it has no other bearing in the case at bar than that which is pointed out above. That case came to this court from the judgment of the state court sustaining a demurrer to the plaintiff's complaint. The plaintiff alleged in his complaint that public land had been wrongfully surveyed as a lake, when there was no lake and the land was agricultural land fit for homestead acquisition; that on October 30th, 1909, he had settled upon it for a homestead; that there were prior occupants who resisted his occupancy, and that they on November 5th, 1909, six days after he went upon the land, had him arrested for unlawful trespass and removed from the land; that the homestead law required five years continuous possession; that he had a right to the possession, and he prayed for judgment to that effect. The court below, on the demurrer, held that the *United States* had made the survey and, therefore, the state courts were without power to go behind the survey and did not have jurisdiction of the case. It will thus appear that in the Gau-

thier case the same conditions were present that are present in the case at bar, viz. (a) that the land is alleged to be public land open to homestead settlement and that the plaintiff went upon it for that purpose; (b) that after a residence there of only six days (nearly a year in the case at bar), he was arrested and removed from the land under the police power of the state (though not under the forcible entry and detainer statute), and that his continuous residence was interrupted and stopped.

In reversing the court below, this court held that the *United States* did *not* make the survey, but that it was made by a hired contractor, who had no authority or power to determine the character of the land, or to make a survey with binding force; that, therefore, taking the allegation of the complaint as true, the land was public land open to homestead settlement; that the plaintiff still had the right to the possession initiated by his six days' residence, and that plaintiff was not deprived of that right by the break in the continuity of possession caused by the police power of the state; that plaintiff, under this right, was entitled to have his possession restored; that there was a state law (Rem. & Bal. Code, Wash., Sec. 942) providing a remedy, or action for the restoration of the possession and the enforcement and preservation of this right; that the state courts had jurisdiction over this land, owned by

the United States, to enforce thereon this state statute and this remedy, and the state court was directed to exercise this jurisdiction. And this court, we submit, clearly held in that case that Congress had interposed no obstacle to the state determining in what way possessory rights claimed on public land, or wrongs with regard to them, should be protected or redressed—that the state might say that the claimant could not protect his right or redress his wrongs by his own efforts, of such character as to threaten the public welfare (forcible entry and detainer statute), but that he must resort to the orderly processes of the courts. In that case this court said:

> "But no interference with that [Land] Department or usurpation of its functions was here sought or involved. It has not been invested with authority to redress or restrain trespassers upon possessory rights, or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public land states, but also recognized and approved by this court."

But the plaintiffs in error arbitrarily demand that, to avoid the inconvenience of going off the

land and bringing another law suit, they be permitted to, in effect, amend the forcible entry and detainer statute of the state and incorporate therein a remedy which the legislature, in its wisdom and discretion, has omitted therefrom—that they be permitted to try title and right of possession. The rule is thus stated:

> "A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her courts."
>
> *Wilcox v. Jackson*, 13 Peters, 498.
>
> "We think it is well settled that no one has a vested right in or to any particular remedy or method of procedure."
>
> *Wintermute v. Carner*, 8 Wash., 585;
>
> 2 Story on Constitution, Sec. 1385 (5th Ed.)
>
> "But it is clear that the fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another."
>
> *Ia. Central Ry. Co. v. State of Iowa*, 160 U. S., 389.

That temporary inconvenience results to any particular defendant, by the application of the general rule of law to him that applies to all other citizens of the state, does not cause the forcible entry and detainer statute to be unconstitutional. This particular point has been passed upon by this court, saying:

> "It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily."

Hadacheck v. Sebastian, 239 U. S., 394;
Barbier v. Connoly, 113 U. S., 27;
The Montana Co. v. The St. L., M. & M. Co., 152 U. S., 160.

The supreme court of the state of Washington, in considering the forcible entry and detainer statute, and, in holding it constitutional, said:

> "Numerous other instances might be mentioned in which the owner is temporarily deprived of the possession of his property pending litigation concerning it, but we think it would be going too far to conclude that he is thereby deprived of his property within the meaning of the constitutional provision."

State ex rel. Loan Society v. Prather, 19 Wash., 336;
Morris v. Healey Lmbr. Co., 33 Wash., 451.

Act of Congress of February 25, 1885.

It is quite in keeping with the arbitrary demand of the plaintiffs in error that the courts of the state grant them, in this action, a relief which the statute itself does not permit the courts to give, that they strive to rely in this forcible detainer action upon an act of Congress providing for the prosecution of certain offences therein denounced. The act of Congress is that of February 25, 1885. (23 Stat. at L., 321). This statute, it is submitted, has nothing to do with the question whether the state courts may or may not enforce the state statutes in regard to civil actions. Nor is it material in this action whether the plaintiff has or has not color of title, however material color of title may be under that act of Congress. Color of title merely goes to the *right* of possession, and the *right* of possession cannot be tried in this action, and, therefore, proof of color of title is not admissible. But if by any possibility the fact of color of title could become material, the want of it is an element of the offense denounced by the act of Congress, and the burden is on the party charging the offense to prove it. This was not done. The act of Congress above referred to is entitled "An act to prevent unlawful occupancy of public lands," and is a criminal statute, with the machinery provided

therein for prosecutions, at the instance of the United States attorney in each district, of the offenses therein denounced and for the punishment thereof. It seems clear that the plaintiffs in error cannot turn a forcible detainer action, under the state statute, into a criminal prosecution under a federal statute. The only application which this act of Congress can have in the present action is to show that the plaintiffs in error, not only have the complete remedy for the protection of their right to settle and acquire, which is contained in the ejectment statute of the state, but also have a remedy under this act of Congress by which they could have had the defendants in error, if unlawfully preventing the plaintiffs in error from settling on the lands, prosecuted and punished therefor in the federal courts and the obstructions to their settlement removed.

The Construction of the State Statute by the State Court is Conclusive Here.

It is further urged by the plaintiff in error that, under the state statute, one cannot be guilty of a forcible detainer except he be one "who in the night time or during the absence of the occupant of any real property *unlawfully* enters thereon," and it is claimed in this connection that, since the plaintiffs in error went upon what they

allege to be public land subject to homestead settlement, it could not be shown in this case that they went upon the land "unlawfully." We think the state court must necessarily have construed this word against the contention of the plaintiffs in error in rendering judgment against them, and this point is within the exclusive jurisdiction of the state court. Where, however, it does not appear in the record what construction was put upon a given part of a state statute by a state court, this court will not take jurisdiction and reverse purely on the construction of that part of the statute.

> *Phoenix Ins. Co. v. Gardner,* 11 Wall., 204;
> *Morley v. Lake Shore & Michigan Southern R. Co.,* 146 U. S., 162.

The meaning of this word, however, is quite clear, we submit, and has been many times construed. The word "unlawfully" in this connection means whether the party charged went upon the land unlawfully *as regards the then occupant* —that is, whether such party went upon the lands with the permission of the then occupant or without it. If without the permission of the then occupant and against his will, such party went upon the lands "unlawfully."

> "Under the code all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of

the defendant no longer affects the right of recovery in this form of action."

Voll v. Hollis, 60 Calif., 569.

"The word unlawful, as used in the section, means unlawful with respect to the relations between plaintiff and defendant."

Dutcher v. Sanders, (Cal.), 129 Pac., 809; *Carteri v. Roberts,* (Cal.), 73 Pac., 818.

The Washington Code Does Not Put the Right of Possession in Issue.

The plaintiffs in error further urge that the right of possession is directly put in issue under the letter of the forcible entry and detainer statute, found in Rem. & Bal. Code of Washington, Sec. 825, as follows:

"Sec. 825. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

This section of the statute was before the Washington state court in *Gore v. Altice,* supra, where that court said:

"It is a provision for a speedy determination, not of any title to the real estate, *or of*

> *the right of possession*, but of the question of who was in actual possession, and if such actual possession was disturbed." (Italics ours).

And in that case that court quoted with approval from *Mitchell v. Davis*, 23 Cal., 381, as follows:

> "If the defendant has any title *or right of possession* to the land, it must be tried in some action proper for trying such questions, but the present is not an action of that kind."

The statute of California (C. C. P., Sec. 1172), is the same as Rem. & Bal. Code of Washington, Sec. 825. Section 825 first provides that, where the action is for forcible entry, it is sufficient to show actual peaceable possession at the time of the forcible entry, but this would not be sufficient in the case of forcible detainer because, under Sec. 811, Rem. & Bal. Code of Washington, one is not "entitled to the possession," as against a forcible detainer, unless one has been "in the peaceable and undisturbed possession" of the property for "five days next preceding such unlawful entry." Therefore, after showing that the defendant, say, went on in the night time and had refused to go off for a period of three days after notice, which would constitute the forcible detainer, the plaintiff would have to prove, not only that he was in possession *at the time of the*

entry, but also that he was entitled *"at the time of the forcible detainer,"* as against the defendant, to the possession, and this he could only do by showing that he had been in possession "for the five days next preceding the unlawful entry."

It is further obvious that when the defendant was forcibly detaining the premises from the plaintiff, the plaintiff could not show, as he could at the time of the forcible entry, that he was in the actual possession of the land, since the defendant would be in the possession of the land and detaining it from him, and so all that the plaintiff could be called upon to prove in the case of forcible *detainer* would be, not that he was in the actual possession, but that he was *entitled* to be in the actual possession as against the defendant.

The forcible entry and detainer statute being for the only purpose of preserving the peace and of preventing men from resorting to violence, it is obvious, we submit, that this function and purpose would be very largely destroyed if the statute could only operate in those cases where the party first in possession could show a legal title, or a legal right to possession, as under a lease or such matter. The invasion of the possession of one holding the title, or a legal right under a lease, would be a rare occurrence as compared with those cases where the first possessor had no title, or no legal right to the possession. Where

title was had, in most cases, the records would disclose the fact to the public and prevent violent invasion and breach of the peace. It is, on the other hand, those cases where the right of the possessor is not recorded, and, therefore, apparently uncertain, that men are most apt to be tempted to resort to violence and invade such possession, with the hope of taking advantage of the uncertain title or right of possession. Breach of the peace would be at least equally liable under both conditions.

Respectfully submitted.

REESE H. VOORHEES,
H. W. CANFIELD,
Counsel for Defendants in Error,
Spokane, Wash.

Office Supreme Court, U. S.
FILED
OCT 27 1917
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1917

H. J. GUNNING and ELLEN E. GUNNING, his wife,
Plaintiffs in Error,

vs.

PETER MORRISON and AGNES MORRISON, his wife,
Defendants in Error.

No. 440

LOUIS H. DENEE,
Plaintiff in Error,

vs.

W. M. RIDPATH,
Defendant in Error.

No. 147

SHAW & BORDEN CO. 169931

IN THE

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October Term, 1917

H. J. GUNNING and ELLEN E. GUNNING, his wife,
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Plaintiff in Error,

vs.

W. M. RIDPATH,
Defendant in Error.

No. 147

SHAW & BORDEN CO. 165931

MOTION TO ADVANCE AND TO BE HEARD TOGETHER.

Come now the plaintiffs in error and the defendants in error in the above entitled cases, by their respective counsel, and move the court for an order granting leave of the court that the above entitled case No. 440 may be heard together with the case entitled Louis H. Denee, plaintiff in error, v. W. M. Ridpath, defendant in error, No. 147, October Term 1917, and advancing the said case No. 440 to be argued with the said case No. 147 when the said case No. 147 shall be reached for hearing, under the 26th rule of the court, section 8.

The grounds on which this motion is based are as follows:

(1) That these suits are brought, under the forcible entry and detainer statute of the state of Washington, by the defendants in error respectively, to recover possession of certain lands and damages from the plaintiffs in error. The said lands were fenced, cultivated and in the peaceable and undisturbed possession of the defendants in error respectively, and were entered upon by the plaintiffs in error in the night time and in the absence of the defendants in error, without their permission and against their will. It is alleged by plaintiffs in error in each case, as a defense, that the land involved is owned by the United States and open to homestead settlement as a part of the public domain, and that plaintiffs in error went upon said land to acquire title

to the same under the homestead laws, as qualified homestead settlers. This defense was struck out below, and after trial judgment was entered for defendants in error in each case.

(2) That the said two cases involve and are decided by a determination of the same questions, the facts being of like character in both, and in both it is charged that a state statute, to-wit, the forcible entry and detainer statute, is in conflict with an act of congress, to-wit, the homestead laws, and the federal constitution, and is therefore inoperative.

(3) That both of the parties to case No. 440 and both of the parties to case No. 147, by their respective counsel, by stipulation, have consented that case No. 440 may, by leave of the court, be advanced and heard together with case No. 147, under rule of court 26, section 8, said stipulation being hereto attached and made a part of this motion, together with the records in each of said cases.

FRED B. MORRILL,
JOHN J. SKUSE,
Counsel for Plaintiffs in Error in No. 440
REESE H. VOORHEES,
H. W. CANFIELD,
Counsel for Defendants in Error in No. 440
FRED B. MORRILL,
JOHN J. SKUSE,
Counsel for Plaintiff in Error in No. 147
D. W. HENLEY,
Counsel for Defendant in Error in No. 147

IN THE

SUPREME COURT

OF THE

United States

October Term, 1917

H. J. GUNNING and ELLEN E. GUNNING, his wife,
Plaintiffs in Error,

vs.

PETER MORRISON and AGNES MORRISON, his wife,
Defendants in Error.

No. 440

LOUIS H. DENEE,
Plaintiff in Error,

vs.

W. M. RIDPATH,
Defendant in Error.

No. 147

STIPULATION TO ADVANCE AND TO BE HEARD TOGETHER.

It is hereby STIPULATED and AGREED, by and between the plaintiffs in error and the defendants in error in cause No. 440 October Term 1917, entitled H. J. Gunning and Ellen E. Gunning, his wife, plaintiffs in error, v. Peter Morrison and Agnes Morrison, his wife, defendants in error, by their respective counsel, and by plaintiff in error and defendant in error in cause No. 147 October Term 1917, entitled Louis H. Denee, plaintiff in error, v. W. M. Ridpath, defendant in error, by their respective counsel, that, upon leave of the court being had, the said cause No. 440 shall be advanced for hearing, and that said cause No. 440 and the said cause No. 147 shall be heard and argued together as one case, under rule of court 26, section 8, when the said cause No. 147 shall be reached for argument in the regular call of the docket.

FRED B. MORRILL,
JOHN J. SKUSE,
Counsel for Plaintiffs in Error in No. 440
REESE H. VOORHEES,
H. W. CANFIELD,
Counsel for Defendants in Error in No. 440
FRED B. MORRILL,
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D. W. HENLEY,
Counsel for Defendant in Error in No. 147